TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 196

No. [redacted] 47

H. REES PAPER COMPANY, PETITIONER,

vs.

UNITED STATES.

ON [redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 704

ST. REGIS PAPER COMPANY, PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. A] [File endorsement omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 150-271

UNITED STATES OF AMERICA, Plaintiff,

v.

ST. REGIS PAPER COMPANY, Defendant.

COMPLAINT—Filed September 15, 1959

Plaintiff, the United States of America, by the United States Attorney for the Southern District of New York, acting under the direction of the Attorney General of the United States, upon the request of the Federal Trade Commission (hereinafter referred to as the "Commission"), brings this action (1) for the enforcement against defendant of the several orders of the Commission described herein, and attached as exhibits hereto, which orders require defendant and certain other corporations to file special reports with the Commission, and (2) for the recovery of forfeitures because of defendant's failure to comply with the two orders requiring it to file special reports.

Count One

1. The cause of action alleged in this Count arises under Section 9 of the Federal Trade Commission Act (15 U. S. C. 49), which vests the District Courts of the United States with jurisdiction to enter orders commanding any person or corporation to comply with any order of the Commission made in pursuance of the Act.

2. Defendant, St. Regis Paper Company, is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business

within this District at 150 East Forty-second Street, New York, New York.

[fol. 3] 3. During all times mentioned herein, defendant has been engaged in the business of manufacturing various types of paper and paper products, and of selling and distributing such paper and paper products in interstate commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act (15 U. S. C. 44).

4. The Commission, on January 6, 1959, pursuant to subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (15 U. S. C. 46 (a)(b)), adopted a resolution directing an investigation of the organization, business, conduct, practices, and management of St. Regis Paper Company and of the corporations engaged in interstate commerce whose stock or assets, or stock and assets, had been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations. A true and complete copy of the said resolution is attached hereto as Exhibit A, and is made a part hereof.

5. The Commission, on January 9, 1959, issued six orders pursuant to the said resolution of January 6, 1959, one of which was directed to each of the six corporations named below, requiring the corporation addressed in each instance to file a special report, containing specified data and documents, with the Commission within thirty days after service of the order. Each of the orders dated January 9, 1959, together with a copy of the said resolution adopted January 6, 1959, was served by registered mail upon the corporation to which the order was directed. The corporations to which the said orders were directed, [fol. 4] and the date of service of the order and the resolution in each instance, are as follows:

St. Regis Paper Company	—January 12, 1959;
Growers Container Corporation	—January 14, 1959;
F. J. Kress Box Company, Inc.	—January 12, 1959;
Pacific Waxed Paper Company	—January 13, 1959;
Pollock Paper Corporation	—January 12, 1959;
Rhinelander Paper Company	—January 12, 1959.

True and complete copies of the said orders requiring reports are attached hereto as Exhibits B through G, respectively, and are made parts hereof.

6. The Commission, on March 5, 1959, issued, and caused to be served by registered mail on defendant and on each of the other corporations named in paragraph 5 hereof, an order suspending the directions contained in its order of January 9, 1959, pending the Commission's decision on defendant's motion to vacate the Commission's said resolution of January 6, 1959, and its said orders of January 9, 1959. The Commission, on May 6, 1959, denied the said motion and ordered that the reports, originally due within 30 days after service of the orders of January 9, 1959, be filed on or before May 28, 1959. The Commission's said order of May 6, 1959, was served by registered mail on defendant and on each of the other corporations named in paragraph 5 hereof on the following dates:

St. Regis Paper Company	— May 7, 1959;
Growers Container Corporation	— May 11, 1959;
F. J. Kress Box Company, Inc.	— May 7, 1959;
Pacific Waxed Paper Company	— May 11, 1959;
Pollock Paper Corporation	— May 11, 1959;
Rhinelander Paper Company	— May 11, 1959.

[fol. 5] A true and complete copy of the Commission's said order of May 6, 1959, is attached hereto as Exhibit H, and is made a part hereof.

7. Defendant and each of the other corporations to which the said orders of January 9, 1959, were directed have failed to file the required special reports, either on or before May 28, 1959, or at any time thereafter.

8. The Commission, on June 4, 1959, adopted a resolution broadening the investigation directed by its resolution dated January 6, 1959, to include investigation of the acquisition or proposed acquisition by St. Regis Paper Company of the stock or assets, or stock and assets, of two additional corporations engaged in interstate com-

merce, Northwest Door Company and Cupples-Hesse Corporation, and to include investigation of the organization, business, conduct, practices, and management of Northwest Door Company and Cupples-Hesse Corporation, and the relation of St. Regis Paper Company, Northwest Door Company and Cupples-Hesse Corporation to each other and to other corporations. A true and complete copy of the resolution adopted June 4, 1959, is attached hereto as Exhibit I, and is made a part hereof.

9. The Commission, on June 8, 1959, issued three orders pursuant to the said resolution of June 4, 1959, which orders were respectively directed to St. Regis Paper Company, Cupples-Hesse Corporation, and Northwest Door Company, and each of which orders required the corporation addressed to file a special report, containing specified data and documents, with the Commission within 30 days after service of the order. The respective orders dated June 8, 1959, each with a copy of the said resolution adopted [fol. 6] June 4, 1959, were served by registered mail upon the corporations to which the orders were directed on the following dates:

St. Regis Paper Company	—June 9, 1959;
Cupples-Hesse Corporation	—June 10, 1959;
Northwest Door Company	—June 12, 1959.

True and complete copies of the said orders requiring reports are attached hereto as Exhibits J through L, respectively, and are made parts hereof.

10. Defendant and each of the other corporations to which the said orders of June 8, 1959, were directed have failed to file the required special reports, either within thirty days of the service of the orders or at any time thereafter.

11. Defendant has notice and full knowledge of the terms of the Commission's said orders requiring special reports from Growers Container Corporation, F. J. Kress Box Company, Inc., Pacific Waxed Paper Company, Pol-

lock Paper Corporation, Rhinelander Paper Company, Cupples-Hesse Corporation, and Northwest Door Company. On information and belief, it is averred that each of these corporations has been dissolved and merged into defendant, or is owned, controlled and dominated by defendant and is in the process of being dissolved and merged into defendant. As a consequence thereof, defendant has possession or control of the books, papers and records from which the reports required from each of the said corporations can be prepared, and is obligated to file with the Commission all said reports.

[fol. 7]

Count Two

12. The cause of action alleged in this Count arises under Section 10 of the Federal Trade Commission Act (15 U. S. C. 50), which vests any District Court of the United States in which a corporation has its principal office or in which it does business with jurisdiction of suits by the United States for the recovery of forfeitures if the corporation shall fail to file any special report required by the Act within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default.

13. Plaintiff repeats and realleges each and every allegation contained in paragraphs 2 through 10 of this complaint insofar as such allegations relate to St. Regis Paper Company, defendant herein.

14. The Commission, on June 18, 1959, pursuant to Section 10 of the Federal Trade Commission Act (15 U. S. C. 50), issued its notice of default to defendant because of defendant's failure to file the special report required from it by the Commission's order dated January 9, 1959. The said notice of default was served upon defendant by registered mail on June 20, 1959. A true and complete copy of the said notice of default dated June 18, 1959, is attached hereto as Exhibit M and is made a part hereof.

15. The failure of defendant to file the report required by the Commission's order dated January 9, 1959, has continued for thirty days after service of the notice of such default, and is still continuing.

[fol. 8] 16. The Commission, on July 22, 1959, pursuant to Section 10 of the Federal Trade Commission Act (15 U. S. C. 50), issued its notice of default to defendant because of defendant's failure to file the special report required from it by the Commission's order dated June 8, 1959. The said notice of default was served upon defendant by registered mail on July 24, 1959. A true and complete copy of the said notice of default dated July 22, 1959, is attached hereto as Exhibit N, and is made a part hereof.

17. The failure of defendant to file the report required by the Commission's order dated June 8, 1959, has continued for thirty days after service of the notice of such default, and is still continuing.

Wherefore, plaintiff demands:

1. That the Court issue a mandatory injunction commanding defendant and its agents, attorneys, employees and assigns to file with the Federal Trade Commission all the special reports required by the Commission's several orders dated January 9, 1959, and June 8, 1959.

2. Judgment against defendant in the amount of $100 a day for each and every day from and after July 20, 1959, that defendant has failed to file with the Commission the report required from defendant by the Commission's order of January 9, 1959, and judgment against defendant in the amount of $100 a day for each and every day from and after August 23, 1959, that defendant has failed to file with the Commission the report required [fol. 9] from defendant by the Commission's order of June 8, 1959.

3. That the defendant pay the costs and disbursements of this action.

4. That plaintiff be given such other and further relief as the Court may deem just and proper.

S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office and Post Office Address: United States Courthouse, Foley Square, New York 7, New York, By William F. Suglia, Assistant United States Attorney.

Alan B. Hobbes, Assistant General Counsel, J. B. Truly, Attorney, Federal Trade Commission, Washington, D. C.

[fol. 10]

EXHIBIT A, ANNEXED TO COMPLAINT

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

JOHN W. GWYNNE, Chairman
ROBERT T. SECREST
SIGURD ANDERSON
WILLIAM C. KERN
EDWARD T. TAIT

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY

RESOLUTION DIRECTING INVESTIGATION OF THE ACQUISITION BY ST. REGIS PAPER COMPANY OF THE STOCK OR ASSETS, OR BOTH THE STOCK AND ASSETS, OF OTHER CORPORATIONS

WHEREAS, the Commission has information to the effect that St. Regis Paper Company, a corporation engaged in interstate commerce and subject to the jurisdiction of the

Commission, has acquired, since January 1, 1954, the stock or assets, or both the stock and assets, of other corporations engaged in interstate commerce and subject to the jurisdiction of the Commission; and

WHEREAS, the said acquisitions may be in violation of Section 7 of the Clayton Act (15 U. S. C., Sec. 18), a statute administered by the Commission; and

[fol. 11] WHEREAS, the Commission believes that it is in the public interest to investigate the said acquisitions by St. Regis Paper Company to determine their combined effect, and the effect of any one or more of said acquisitions, upon competition; and

WHEREAS, the Commission has the authority under subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (15 U. S. C., Sec. 46(a) (b)) to investigate corporations engaged in interstate commerce and their practices to determine whether the laws administered by the Commission may have been violated;

NOW, THEREFORE, BE IT RESOLVED that the Commission, in the exercise of the powers vested in it by law, and pursuant to its published procedures and rules of practice (16 CFR, 1957 Supp., 1.1 et seq.), and with the aid of any and all compulsory processes available to it, do forthwith proceed to investigate, for the reasons and purposes stated herein, the organization, business, conduct, practices, and management of St. Regis Paper Company and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations.

By the Commission.

(Sgd.) ROBERT M. PARRISH,
Secretary.

[SEAL]

Dated: January 6, 1959.

[fol. 12]

EXHIBIT B, ANNEXED TO COMPLAINT

Jan. 9, 1959

St. Regis Paper Company,
150 East 42nd Street,
New York 17, New York.

ORDER REQUIRING FILING OF SPECIAL REPORT

Re: File No. 5510696

Gentlemen:

Pursuant to a resolution of the Federal Trade Commission dated January 6, 1959, and entitled "Resolution Directing Investigation of the Acquisition by St. Regis Paper Company of the Stock or Assets, or Both the Stock and Assets, of Other Corporations," a copy of which is enclosed, you are ordered to submit a special report to the Commission within thirty days, containing the information and documents specified in the following questions.

In your answer please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

Wherever information pertaining to an acquired company is requested for a period subsequent to the merger of that company into your company or a subsidiary of your company, the specified information is to be provided for the plants operated by the acquired companies at the time of their acquisition, in whatever form the plants existed during the period for which the information is requested.

[fol. 13] 1. Submit photo copies or certified true copies of the following materials:

(a) Contracts, options and agreements of your company or a subsidiary of your company with Growers Con-

tainer Corporation or with stockholders of Growers Container Corporation, relating to its acquisition.

(b) Contracts, options and agreements of your company or a subsidiary of your company with F. J. Kress Box Company or with stockholders of F. J. Kress Box Company relating to its acquisition.

(c) Correspondence, internal office memoranda, and special reports prepared by or for your company or a subsidiary of your company relating to the acquisition of either Growers Container Corporation or Kress Box Company. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided such items contain no annotations relevant to the negotiations between the company subsequently acquired, its stockholders, and St. Regis.

(d) The annual report of your company for 1957 and of each prospectus issued since January 1, 1958.

(e) Copies of schedules submitted by J. Neils Lumber Company and St. Paul and Tacoma Lumber Co. for the 1954 Census of Manufacture.

(f) Schedules covering the period January 1, 1957, to the date of this order which were submitted by (1) your company, (2) Superior Paper Products Co., (3) General [fol. 14] Container Corporation, (4) Ajax Box Company, (5) Cambridge Corrugated Box Co., (6) Gummed Products Co., (7) J. Neils Lumber Co., and (8) St. Paul and Tacoma Lumber Co., to the Bureau of the Census in conjunction with (i) the Facts for Industry Program, and (ii) the Annual Survey of Manufactures.

(g) Schedules covering the period January 1, 1954, to the date of this order which were submitted by (1) your company, (2) Superior Paper Products Co., (3) General Container Corporation, (4) Ajax Box Company, (5) Cambridge Corrugated Box Co., (6) Gummed Products Co., (7)

J. Neils Lumber Co., and (8) St. Paul and Tacoma Lumber Co., to any association or to any individual, or firm collecting data on sales, orders, deliveries and/or inventories of similar products from several manufacturers and preparing reports thereon, and the name and address of each such trade association, individual or firm.

(h) All statistical summaries or reports prepared by a trade association, individual or firm and based on the type of data referred to in 1(g).

(i) Correspondence amending or clarifying any of the schedules or reports specified under (e), (f), (g) and (h).

With reference to (f), (g) and (h), what the Commission requires is annual totals for each of the years specified, plus schedules and reports for the period subsequent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

2. (a) Identify the plants which during 1954 received the 2524 tons of interplant transfers of gumming stock re- [fol. 15] ported to the Bureau of the Census on schedules for the Jacksonville and East Pepperell mills.

(b) State what end products were manufactured from this gumming stock.

(c) Report the value of shipments or the net sales of each of the following products during 1955 by plants of your company other than the plants of Gummed Products Company:

(1) gummed sealing tape;

(2) gummed reinforced box tape;

(3) flat gummed paper.

(d) If item (1) above exceeded $1 million, report (1) corresponding data for 1956 and 1957; (2) the production or the shipments (in tons) of gummed sealing tape in 1955 and 1956 (specifying which it is); (3) submit copies of catalogs or other printed materials describing this product

which were furnished customers or prospective customers during 1955; (4) furnish the names and addresses of the ten largest customers of these plants for gummed sealing tape in each year 1955, 1956 and 1957; and for each of these customers report the dollar value of gummed sealing tape purchased or received in shipment from these plants.

(e) If item (2) or item (3) specified in 2(c) exceeded $500,000, report for that type of product the information specified in question 2(d).

[fol. 16] 3. For Superior Paper Products Co. (Inc.) supply the information specified below:

(a) List the names and addresses of each supplier from whom Superior during 1953 made more than 5% of its purchases of (1) linerboard, (2) corrugating material, (3) container chipboard, (4) folding boxboard stock, (5) special foodboard, (6) gummed reinforced box tape, (7) any other type of paper or paperboard of which the company's purchases that year exceeded $500,000.

(b) Furnish the same information for 1957.

(c) For each type of material listed in (a) give the total dollar value of Superior's purchases in 1953 and the value of its purchases from each supplier listed in your answer to that question.

(d) For each type of material listed in your answer to (b) give the total dollar value of Superior's purchases in 1957, and the value of its purchases from each of the suppliers listed in your answer to question (b).

(e) For each type of material listed in (a) give the proportion of Superior's total requirements during 1953 (1) produced and supplied by Superior itself, (2) obtained from St. Regis or subsidiaries of St. Regis, including R-W Paper Company, and (3) purchased from other suppliers.

(f) For each type of material listed in your answer to (b), give the corresponding information for 1957.

(g) Report the total sales or the total value of shipments of Superior in 1953 and the company's sales or the value of its shipments of each product or product line.

[fol. 17] (h) For each product or product line listed in your answer to questions (g) (1) identify the area to which Superior normally made shipments in 1953; (2) give the names and addresses of Superior's ten largest customers in 1953; and (3) give the value of its sales during that year or the value of its shipments of the particular product or product line to each of these customers, and to St. Regis and St. Regis' subsidiaries. You may omit product lines comprising less than 10% of Superior's total sales provided the omitted lines do not aggregate more than 15% of Superior's total sales.

(i) Report the information specified in (g) and (h) for the year 1957.

(j) Describe any changes which have been made in the character and scope of Superior's operations since St. Regis acquired control of the company.

(k) Briefly describe any major improvements in the productive facilities of Superior since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged, or has been altered to permit the manufacture of different products.

5. For General Container Corporation, supply the information specified below:

(a) List the names and addresses of each supplier from whom General during 1954 made more than 5% of its purchases of (1) linerboard, (2) corrugating material, (3) container chipboard, (4) folding boxboard stock, (5) special foodboard, (6) gummed reinforced box tape, (7) any other type of paper or paperboard of which the company's purchases that year exceeded $500,000.

[fol. 18] (b) Furnish the same information for 1957.

(c) For each type of material listed in (a) give the total dollar value of General's purchases in 1954 and the

value of its purchases from each supplier listed in your answer to that question.

(d) For each type of material listed in your answer to (b) give the total dollar value of General's purchases in 1957, and the value of its purchases from each of the suppliers listed in your answer to question (b).

(e) For each type of material listed in (a) give the proportion of General's total requirements during 1954 (1) produced and supplied by General itself, (2) obtained from St. Regis or subsidiaries of St. Regis, including R-W Paper Company, and (3) purchased from other suppliers.

(f) For each type of material listed in your answer to (b), give the corresponding information for 1957.

(g) Report the total sales or the total value of shipments of General in 1954 and the company's sales, or the value of its shipments of each product or product line.

(h) For each product or product line listed in your answer to questions (g) (1) identify the area to which General normally made shipments in 1954, (2) give the names and addresses of General's ten largest customers in 1954, (3) and give the value of its sales during that year or the value of its shipments of the particular product or product line to each of these customers and to St. Regis and St. Regis' subsidiaries. You may omit product lines comprising less than 10% of General's total sales provided the omitted lines do not aggregate more than 15% of General's total sales.

[fol. 19] (i) Report the information specified in (g) and (h) for the year 1957.

(j) Describe any changes which have been made in the character and scope of General's operations since St. Regis acquired control of the company.

(k) Briefly describe any major improvements in the productive facilities of General since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged, or

has been altered to permit the manufacture of different products.

6. For Ajax Box Company supply the information specified below:

(a) List the names and addresses of each supplier from whom Ajax during 1955 made more than 5% of its purchases of (1) linerboard, (2) corrugating material, (3) container chipboard, (4) folding boxboard stock, (5) special foodboard, (6) gummed reinforced box tape, (7) any other type of paper or paperboard of which the company's purchases that year exceeded $500,000.

(b) Furnish the same information for 1957.

(c) For each type of material listed in (a) give the total dollar value of Ajax's purchases in 1955 and the value of its purchases from each supplier listed in your answer to that question.

(d) For each type of material listed in your answer to (b) give the total dollar value of Ajax's purchases in 1957, and the value of its purchases from each of the suppliers listed in your answer to question (b).

[fol. 20] (e) For each type of material listed in (a) give the proportion of Ajax's total requirements during 1955 (1) produced and supplied by Ajax itself, (2) obtained from St. Regis or subsidiaries of St. Regis; including R-W Paper Company, and (3) purchased from other suppliers.

(f) For each type of material listed in your answer to (b) give the corresponding information for 1957.

(g) Report the total sales or the total value of shipments of Ajax in 1955 and the company's sales, or the value of its shipments, of each product or product line.

(h) For each product or product line listed in your answer to questions (g), (1) identify the area to which Ajax normally made shipments in 1955, (2) give the names and addresses of Ajax's ten largest customers in 1955, (3) and give the value of its sales during that year or the value of its shipments of the particular product or

product line to each of these customers and to St. Regis and St. Regis' subsidiaries. You may omit product lines comprising less than 10% of Ajax's total sales provided the omitted lines do not aggregate more than 15% of Ajax's total sales.

(i) Report the information specified in (g) and (h) for the year 1957.

(j) Describe any changes which have been made in the character and scope of Ajax's operations since St. Regis acquired control of the company.

(k) Briefly describe any major improvements in the productive facilities of Ajax since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged, or [fol. 21] has been altered to permit the manufacture of different products.

7. For Cambridge Corrugated Box Company, supply the information and documents specified in question 6 with respect to Ajax Box Company.

8. For Gummed Products Company supply the information specified below:

(a) List the names and addresses of each supplier from whom Gummed Products during 1955 made more than 5% of its purchases of (1) unbleached kraft gumming stock, and (2) gumming stock other than unbleached kraft, (3) any other type of paper or paperboard of which the company's purchases that year exceeded $500,000.

(b) Furnish the same information for 1957.

(c) through (f). For each type of material listed in your answers to (a) and (b), supply the information for 1955 and 1957, respectively, specified in question 6(c) through (f) with respect to another company.

(g) Report the total sales or the total volume of shipments in 1955 of (1) gummed kraft sealing tape, (2) gummed reinforced box tape, (3) flat gummed printing

papers and any other products or product lines manufactured by Gummed Products.

(h) For each product or product line listed in your answer to question (i), (1) identify the area in which Gummed Products normally made shipments in 1955; (2) give the names and addresses of Gummed Products' [fol. 22] ten largest customers in 1955 and its 1955 sales, or the value of its shipments of the particular product or product line to each of these customers and to St. Regis and St. Regis' subsidiaries. You may omit any products or product lines comprising less than 10% of the company's total sales, provided the omitted lines do not aggregate more than 15% of Gummed Products' total sales.

(i) Report the information specified in (g) and (h) for the year 1957.

(j) Describe any changes which have been made in the character and scope of Gummed Products' operations since St. Regis acquired control of the company.

(k) Briefly describe any major improvements in the productive facilities of Gummed Products since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged, or has been altered to permit the manufacture of different products.

9. For J. Neils Lumber Company supply the information requested below:

(a) Furnish a list of plants, their location, their principal product lines and rated capacities for each product line.

(b) Furnish the names and addresses of the twenty largest customers and the dollar volume of sales to each for the calendar years 1956 and 1957.

(c) Furnish complete details of all sales or transfers of products to St. Regis, its divisions or its subsidiaries in the calendar years 1956 and 1957.

[fol. 23] (d) Describe the method of distribution of company products for the years 1956 and 1957 and note any changes made in such methods since January, 1957.

(e) For commercial forest lands owned or controlled (under lease or cutting rights) by Neils as of January 1, 1957, report:

(1) The location and acreage by county and state.

(2) The location in relation to commercial forest lands owned and controlled by St. Regis or St. Paul and Tacoma Lumber Company.

(3) The net volume of live saw timber on such commercial forest lands in board feet distributed by state for:

Douglas Fir
Ponderosa Pine
Hemlock
Lodge Pole Pine
Spruce
Other species.

(f) Furnish complete details on the production and sale of pulp wood, chips, or sawmill waste to pulp or paper mills for the years 1956 and 1957.

10. (a) through (d) and (f). For St. Paul and Tacoma Lumber Company supply the information specified by the corresponding parts of question 9 with respect to J. Neils Lumber Company.

(e) For commercial forest lands owned or controlled [fol. 24] (under lease or cutting rights) by St. Paul as of June 1, 1957, report:

(1) The location and acreage by county and state.

(2) The location in relation to commercial forest lands owned or controlled by St. Regis or J. Neils Lumber Co.

(3) The net volume of live saw timber in board feet distributed by state for:

Douglas Fir
Hemlock
Spruce
Other species.

11. Explain how the business and productive facilities of each of the following companies is being fitted into the operations of your company:

(a) Superior Paper Products Company

(b) Pollock Paper Corporation

(c) General Container Corporation

(d) Ajax Box Company

(e) Cambridge Corrugated Box Company

(f) Gummed Products Company

(g) Pacific Waxed Paper Company

(h) Rhinelander Paper Company

(i) Growers Container Corporation

(j) F. J. Kress Box Company

(k) J. Neils Lumber Company

(l) St. Paul and Tacoma Lumber Company

[fol. 25] 12. For each company marketing some or all of its products in the United States and not named in question 11 of which, since January 1, 1956, St. Regis and/or its subsidiaries has achieved ownership of 25% or more of the voting stock, or has acquired fixed assets valued in excess of $200,000 report:

(a) The company's name and address.

(b) The kind (or kinds) of business in which it was engaged at the time of the acquisition.

(c) Specifically what was acquired. (Where the acquisition consists of voting stock, report the percentage it comprises of the votes of all outstanding shares. Where the acquisition consists of physical assets the description

should set forth the location, character and previous use of each major element).

(d) How the business and productive facilities acquired are being fitted into the operations of St. Regis (including St. Regis' subsidiaries).

13. For each company listed in your answer to question 12 which was a manufacturer of containers, a distributor of containers, a manufacturer of raw materials for containers or producer of a service purchased by either manufacturers or distributors of containers:

(a) Report the date of the acquisition, the name of the acquiring company, and the consideration.

(b) Furnish photo copies or certified true copies of:

(1) Contracts, options and agreements relating to the acquisition.

[fol. 26] (2) Correspondence, internal office memoranda, and special reports prepared by or for your company or a subsidiary of your company relating to the acquisition. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided such items contain no annotations relevant to the negotiations between the company, part or all of whose stock or assets subsequently was acquired, its stockholders, and St. Regis or a St. Regis subsidiary.

14. For each company meeting the specifications of question 13 with respect to which the acquisition by St. Regis and/or its subsidiaries was of corporate stock, or of fixed assets employed in the major portion of the acquired or divesting company's business:

(a) Submit photo copies or certified true copies of:

(1) The company's annual profit and loss statements and year end balance sheets for two years preceding the acquisition and for each subsequent year, together with all supporting statements, exhibits and footnotes.

(2) The latest product catalog or description of the products and/or services of the company.

(3) Schedules submitted for each acquired establishment for the 1954 Census of Manufactures, and the 1954 Census of Business.

(4) Schedules covering the period January 1, 1957, to the date of this order which were submitted for each acquired establishment to the Bureau of the Census in conjunction with (i) the Facts for Industry Program, (ii) the [fol. 27] Annual Survey of Manufactures, or (iii) any other periodic or special report solicited by the Bureau of the Census.

(5) Schedules covering the period January 1, 1957, to the date of this order covering the operations of one or more of the establishments acquired, to any association or to any individual or firm collecting data on production, sales, orders, shipments and/or inventories of similar products and preparing reports thereon, and the name and address of each such trade association, individual or firm.

(6) All statistical summaries or reports prepared by a trade association, individual or firm and based on the type of data referred to in item (5).

(7) Correspondence amending or clarifying any of the schedules or reports specified under items (3), (4), (5) or (6).

With reference to (5), (6) and (7), your attention is called to the first paragraph on page 3 of this letter.

(b) Identify the product lines and the types of service sold by the company, and for each such product line and type of service report:

(1) Its uses or functions.

(2) The classes of customers.

(3) The area in which the company regularly made sales.

(4) The names and addresses of the company's ten largest buyers of the product line or service in the year

prior to the acquisition, and the dollar value of its sales to each of them.

(5) The dollar value of the company's total sales, and [fol. 28] of its sales to St. Regis (including St. Regis' subsidiaries) in the year prior to the acquisition.

(6) Wherever meaningful, the quantity corresponding to each value specified in items (4) and (5) immediately above.

(7) The names and addresses of the company's five chief competitors during the year prior to the acquisition.

(c) Identify the product lines and the types of service which, since the acquisition, St. Regis (including St. Regis' subsidiaries) has supplied the establishments acquired with the company, and for each such product line or type of service report for the year prior to the acquisition and for each accounting period since the acquisition:

(1) The names and addresses of the five principal suppliers of these establishments.

(2) The value of the establishment's total procurements, of their procurements from each of their five principal suppliers, and from St. Regis (including St. Regis' subsidiaries).

(3) Wherever meaningful, the quantity corresponding to each value specified in item (2) immediately above.

15. For each company meeting the specifications of question 13 with respect to which the acquisition by St. Regis and/or its subsidiaries is not covered by question 14:

(a) Wherever the acquisition was of one or more establishments, answer question 14(a)(3), (4) and (7) for those establishments.

(b) Wherever the acquisition was of one or more kinds [fol. 29] of business, answer questions 14(a) (2), (4), (5), (6) and (7), and questions 14(b) and questions 14(c) in their entirety for the kind or kinds of business acquired.

Parts (a) and (b) are not to be interpreted as mutually exclusive.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary.

EXHIBIT C, ANNEXED TO COMPLAINT

Jan. 9, 1959

Growers Container Corporation,
P. O. Box 1211,
Salinas, California.

ORDER REQUIRING FILING OF SPECIAL REPORT

Re: File No. 5510696

Gentlemen:

Pursuant to a resolution of the Federal Trade Commission dated January 6, 1959, and entitled "Resolution Directing Investigation of the Acquisition by St. Regis Paper Company of the Stock or Assets, or Both the Stock and Assets, of Other Corporations," a copy of which is enclosed, you are ordered to submit a special report to the Commission within thirty days, containing the information and documents specified in the following questions. [fol. 30] In your answer please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

1. Furnish the correct title, mailing address, date and state of incorporation of Growers Container Corporation.

2. Submit copies of the following materials:

(a) Contracts, options and agreements relating to St. Regis' acquisition of a controlling stock interest in Growers.

(b) Correspondence, internal office memoranda and special reports prepared by or for Growers in connection with the acquisition. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided they contain no annotations relevant to the negotiations between Growers, its stockholders, and St. Regis.

(c) Annual reports of Growers for the last three years, or if the company made no annual reports, income statements and year and balance sheets, together with all supporting statements and explanatory notes.

(d) Minutes of meetings of the Board of Directors of Growers, and of other formal and informal committee actions relating to the acquisition.

(e) The last Growers product catalog or description of Growers' products issued prior to the date St. Regis Paper Company acquired control.

[fol. 31] (f) The most recent Growers release of each of the following issued during the two years immediately preceding the date St. Regis Paper Company acquired control: (1) comprehensive registration statement, (2) prospectus, (3) solicitation of proxy statement, and statement listing its securities on any security exchange.

3. Submit copies of the following materials:

(a) Schedules submitted by Growers and/or by subsidiaries of Growers to the Bureau of the Census for the 1954 Census of Manufactures, and for the 1955, 1956, and 1957 Annual Survey of Manufactures, except that if any schedule for the Annual Survey of Manufactures contains data for the value of shipments of each class of products for a prior year requested, the schedule for the prior year need not be submitted.

(b) Schedules submitted by Growers or its subsidiaries to any trade association or to any individual or firm collecting data on sales, orders, deliveries, and/or inventories

of similar products from several manufacturers and preparing reports thereon for the period since January 1, 1956.

(c) All statistical summaries or reports prepared by a trade association, individual, or firm, and based on the type of data referred to in question 3(b).

(d) Correspondence with the data collecting agency clarifying or amending any of the schedules or reports referred to in (a), (b) and (c).

With reference to (b), (c) and (d), what the Commission requires is annual totals for each of the years specified, plus schedules and reports for the period subse- [fol. 32] quent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

4. List the specific properties of Growers Container Corporation of which St. Regis acquired control; identify each plant and (a) show its location, (b) describe its principal productive equipment, (d) give its rated capacity, and (e) state whether the plant was in operation in 1954.

5. (a) Show for the calendar year 1957 for each product line, Growers Container Corporation's total dollar value of sales from (1) its plants located in California, and (2) its plants located in Florida, and describe the area to which these plants regularly ship their products.

(b) Give the names and addresses of the ten most important customers during the year ending December 31, 1957 of

(1) plants of Growers Container Corporation located in California;

(2) plants of Growers Container Corporation located in Florida

Specify the quantity and dollar value of sales of Growers Container Corporation to each customer listed above for the calendar years 1956 and 1957, by product or product line.

6. (a) List the names and addresses of each supplier from whom Growers during 1957 made more than five percent of its purchases of:

(1) liner board;

[fol. 33] (2) corrugating material;

(3) container chipboard;

(4) folding boxboard stock;

(5) special food board;

(6) gummed reinforced box tape;

(7) any other type of paper or paperboard of which the company's annual purchases exceeded $500,000.

(b) For each product category listed in (a), give the total dollar value of Growers' purchases in 1957 and the amount purchased from each of the suppliers listed in your answer to (a).

(c) For each product category listed in (a), state the proportion of Growers' total requirements, during 1957.

(1) produced and supplied by Growers itself;

(2) purchased from St. Regis or its subsidiaries;

(3) purchased from other suppliers.

7. Indicate which of Growers' products or product lines are (a) equivalent in use to, or (b) practically substitutable for, products produced by St. Regis Corporation or any of its subsidiaries.

8. Give your understanding of the reasons which caused the stockholders of Growers Container Corporation to sell their securities to St. Regis Paper Company, or to exchange their securities for those of St. Regis Paper Company.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary.

[fol. 34]

EXHIBIT D, ANNEXED TO COMPLAINT

Jan. 9, 1959

F. J. Kress Box Company, Inc.,
1 Twenty-eighth Street,
Pittsburgh, Pennsylvania.

ORDER REQUIRING FILING OF SPECIAL REPORT

Re: File No. 5510696.

Gentlemen:

Pursuant to a resolution of the Federal Trade Commission dated January 6, 1959, and entitled "Resolution Directing Investigation of the Acquisition by St. Regis Paper Company of the Stock or Assets, or Both the Stock and Assets, of Other Corporations," a copy of which is enclosed, you are ordered to submit a special report to the Commission within thirty days, containing the information and documents specified in the following questions.

In your answer please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

1. Furnish the correct title, mailing address, date and state of incorporation of F. J. Kress Box Company.

2. Submit photostat copies or certified true copies of the following materials:

(a) Contracts, options and agreements relating to St. Regis' acquisition of a controlling stock interest in Kress.

[fol. 35] (b) Correspondence, internal office memoranda and special reports prepared by or for Kress in connection with the acquisition. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials or expressions

of appreciation for courtesies, provided they contain no annotations relevant to the negotiations between Kress, its stockholders, and St. Regis.

(c) Annual reports of Kress for the last three years, or if the company made no annual reports, income statements and year-end balance sheets, together with all supporting statements and explanatory notes.

(d) Minutes of meetings of the Board of Directors of Kress, and of other formal and informal committee actions relating to the acquisition.

(e) The last Kress product catalog or description of Kress products issued prior to the date St. Regis Paper Company acquired control.

(f) The most recent Kress release of each of the following issued during the two years immediately preceding the date St. Regis Paper Company acquired control: (1) comprehensive registration statement, (2) prospectus, (3) solicitations of proxy statement, and statement listing its securities on any security exchange.

3. Submit photo copies or certified true copies of the following materials:

(a) Schedules submitted by Kress and/or by subsidiaries of Kress to the Bureau of the Census for the 1954 Census of Manufactures, and for the 1955, 1956 and [fol. 36] 1957 Annual Survey of Manufactures, except that if any schedule for the Annual Survey of Manufactures contains data for the value of shipments of each class of products for a prior year requested, the schedule for the prior year need not be submitted.

(b) Schedules submitted by Kress or its subsidiaries to any trade association or to any individual or firm collecting data on sales, orders, deliveries, and/or inventories of similar products from several manufacturers and preparing reports thereon for the period since January 1, 1956.

(c) All statistical summaries or reports prepared by a trade association, individual, or firm and based on the type of data referred to in question 3(b).

(d) Correspondence with the data collecting agency clarifying or amending any of the schedules or reports referred to in (a), (b), and (c).

With reference to (b), (c) and (d), what the Commission requires is annual totals for each of the years specified, plus schedules and reports for the period subsequent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interum reports are unnecessary.

4. List the specific properties of F. J. Kress Box Company, Inc. of which St. Regis acquired control, identify each plant and (a) show its location, (b) describe its principal productive equipment, (c) give its rated capacity, and (d) state whether the plant was in operation in 1954.

5. Show for the calendar year 1957, for each product or product line, (a) Kress total dollar value of sales, [fol. 37] (b) the area in which it regularly sells, (c) the names and addresses of its 10 chief customers with respect to that particular product or product line, (d) Kress' sales or the value of its shipments of that particular product or product line to each of these 10 customers, and to St. Regis and St. Regis' subsidiaries, and (e) the names and addresses of Kress' 10 principal competitors.

6. (a) List the names and addresses of each supplier from whom Kress during 1957 made more than five percent of its purchases of:

(1) Liner board

(2) Corrugating material

(3) Container chipboard

(4) Folding boxboard stock

(5) Special food board

(6) Gummed reinforced box tape

(7) Any other type of paper or paperboard for which the company's annual purchases exceeded $500,000.

(b) For each product category listed in (a), give the total dollar value of Kress purchases in 1957, and the amount purchased from each of the suppliers listed in your answer to (a).

(c) For each product category listed in (a), state the proportion of Kress' total requirements, during 1957.

(1) Produced and supplied by Kress itself.

(2) Purchased from St. Regis or its subsidiaries.

(3) Purchased from other suppliers.

[fol. 38] 7. Indicate which of Kress' products or product lines are (a) equivalent in use to or (b) practically substitutable for products produced by St. Regis Company or any of its subsidiaries.

8. Give your understanding of the reasons which caused the stockholders of F. J. Kress Box Company to sell their securities to St. Regis Paper Company, or to exchange their securities for those of St. Regis Paper Company.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary.

Enclosure

EXHIBIT E, ANNEXED TO COMPLAINT

Jan. 9, 1959

Pacific Waxed Paper Company,
1505 Sixth Avenue, South,
Seattle 4, Washington.

ORDER REQUIRING FILING OF SPECIAL REPORT

Re: File No. 5510696.

Gentlemen:

Pursuant to a resolution of the Federal Trade Commission dated January 6, 1959, and entitled "Resolution

Directing Investigation of the Acquisition by St. Regis Paper Company of the Stock or Assets, or Both the Stock and Assets, of Other Corporations," a copy of which is enclosed, you are ordered to submit a special report to the Commission within thirty days, containing the information and documents specified in the following questions.

[fol. 39] In your answer, please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

1. Furnish the correct title, mailing address, date and state of incorporation of Pacific Waxed Paper Company.

2. Submit photostat copies or certified true copies of the following materials:

(a) Contracts, options and agreements relating to the acquisition of a controlling stock interest in Pacific Waxed Paper Company by St. Regis Paper Company.

(b) Correspondence, internal office memoranda and special reports prepared by or for Pacific Waxed Paper Company in connection with the acquisition. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided these items contain no annotations relevant to the negotiations between Pacific Waxed Paper Company, its stockholders, and St. Regis.

(c) Minutes of meetings of the Board of Directors of Pacific Waxed Paper Co. and of other formal and informal committee actions relating to the acquisition.

(d) The last Pacific Waxed Paper Co. catalog or description of Pacific's products issued prior to the date St. Regis Paper Company acquired control.

(e) Profit and Loss Statements and year and balance sheets for 1956 and 1957 together with all supporting statements or explanatory notes.

[fol. 40] 3. Submit photo copies or certified true copies of the following materials:

(a) Schedules submitted to the Bureau of the Census for the 1957 Annual Survey of Manufacturers.

(b) Schedules submitted by or for Pacific Waxed Paper Co. to any trade association or to any individual or firm collecting data on sales, orders, deliveries, and/or inventories of similar products from several manufacturers and preparing reports thereon for the period since Jan. 1, 1956, and the name and address of each such trade association, individual or firm.

(c) All statistical summaries or reports prepared by a trade association, individual, or firm, and based on the type of data referred to in question 3(b).

(d) Correspondence with the data collecting agency clarifying or amending any of the schedules or reports referred to in (a), (b) and (c).

With reference to (b), (c) and (d), what the Commission requires is annual totals for each of the years specified, plus schedules and reports for the period subsequent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

4. (a) List the names and addresses of each supplier from whom Pacific Waxed Paper Co. during 1955 made more than 5 percent of its purchases of: (1) waxing stock, (2) waxed paper, and (3) other primary papers.

(b) Furnish the same information for 1957.

(c) For each type of material listed in (a), give the [fol. 41] total dollar value of Pacific's purchases in 1955 and the value of its purchases from each supplier listed in your answer to that question.

(d) For each type of material listed in your answer to (b), give the total dollar value of Pacific's purchases in 1957, and the value of its purchases from each of the suppliers listed in your answer to question (b).

(e) For each type of material listed in (a), give the proportion of Pacific's total requirements during 1955 (1) produced and supplied by Pacific itself (2) obtained from St. Regis or subsidiaries of St. Regis, including R. W. Paper Co., and (3) purchased from other suppliers.

(f) For each type of material listed in your answer to (b), give the corresponding information for 1957.

5. (a) Report the total sales or the total value of shipments of Pacific in 1955 and the company's sales or the value of its shipments of each product or product line.

(b) For each product or product line listed in your answer to question (a), (1) identify the area to which Pacific normally made shipments in 1955, (2) give the names and addresses of Pacific's 10 largest customers in 1955 and its sales or the value of its shipments of the particular product or product line to each of them during that year. You may omit product lines comprising less than 10 percent of Pacific's total sales provided the omitted lines do not aggregate more than 15 percent of Pacific's total sales.

(c) Report the information specified in (a) and (b) for the year 1957.

[fol. 42] 6. (a) Describe any changes which have been made in the character and scope of Pacific's operations since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged, or has been altered to permit the manufacture of different products.

(b) Briefly describe major improvements in or additions to the productive facilities of Pacific since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged, or altered to permit the manufacture of different products.

7. Give your understanding of the reasons which caused the stockholders of Pacific to sell their securities, or to exchange their securities for those of St. Regis.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary.

[fol. 43]

EXHIBIT F, ANNEXED TO COMPLAINT

Jan. 9, 1959

Pollock Paper Corporation,
2236 South Lamar Street,
Dallas 2, Texas.

ORDER REQUIRING FILING OF SPECIAL REPORT

Re: File No. 5510696.

Gentlemen:

Pursuant to a resolution of the Federal Trade Commission dated January 6, 1959, and entitled "Resolution Directing Investigation of the Acquisition by St. Regis Paper Company of the Stock or Assets, or Both the Stock and Assets, of Other Corporations," a copy of which is enclosed, you are ordered to submit a special report to the Commission within thirty days, containing the information and documents specified in the following questions.

In your answer, please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

References to Pollock Paper Corporation below shall be construed to include all subsidiary and affiliate companies excepting Pacific Waxed Paper Company.

1. Furnish the correct title, mailing address, date and state of incorporation of Pollock Paper Company.

[fol. 44] 2. Submit photostat copies or certified true copies of the following materials:

(a) Contracts, options, and agreements relating to St. Regis' acquisition of a controlling stock interest in Pollock.

(b) Correspondence, internal office memoranda and special reports prepared by or for Pollock in connection with the acquisition. You may omit materials relating solely

to contracts and agreements with labor unions and other items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, providing these items contain no annotations relevant to the negotiations between Pollock, its stockholders, and St. Regis.

(c) Minutes of meetings of the Board of Directors of Pollock and of other formal and informal committee actions relating to the acquisition.

(d) The last Pollock product catalog or description of products manufactured by Pollock issued prior to the date St. Regis Paper Company acquired control of Pollock.

(e) Profit and loss statement of Pollock for 1957, and a year end balance sheet, together with all supporting statements or explanatory notes.

3. Submit photo copies or certified true copies of the following materials:

(a) Schedules submitted by Pollock to the Bureau of the Census (1) for the 1954 Census of Business in connection with Pollock's wholesale operations, and (2) for the 1957 Annual Survey of Manufacturers.

[fol. 45] (b) Schedules submitted by Pollock to any trade association or to any individual or firm collecting data or sales, orders, deliveries, and/or inventories of similar products from several manufacturers and preparing reports thereon for the period since January 1, 1956, and the name and address of each such trade association, individual or firm.

(c) All statistical summaries or reports prepared by a trade association, individual, or firm and based on the type of data referred to in question 3(b).

(d) Correspondence with the data collecting agency clarifying or amending any of the schedules or reports referred to in (a), (b) and (c).

With reference to (b), (c) and (d), what the Commission requires are annual totals for each of the years specified, plus schedules and reports for the period subsequent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

4. (a) Report the total sales or the total value of shipments of Pollock in 1954 and the company's sales, or the value of its shipments of (1) waxed bread wraps, (2) cellophane bread wraps, (3) folding cartons, (4) set-up paper boxes, (5) corrugated shipping containers, (6) other products or product lines manufactured by Pollock, and (7) all other sales.

(b) For each product line numbered (1) through (5) in question 4(a), (1) identify the area to which Pollock normally made shipments in 1954, (2) give the names and addresses of Pollock's ten largest customers in 1954 and [fol. 46] its sales or the value of its shipments of the particular product or product line to each of them during that year.

(c) Report for the year 1957 the information specified in (a) and (b).

(d) Report the proportion of Pollock's total sales or shipments in 1954 consisting of (1) products produced by Pollock, (2) products purchased from St. Regis and its subsidiaries for resale, (3) products purchases from other companies for resale.

(e) Report the same information for the year 1957.

5. (a) List the names and addresses of each supplier from whom Pollock during 1954 made more than 5% of its purchases of: (1) linerboard, (2) corrugating material, (3) container shipboard, (4) folding boxboard stock, (5) special food board, (6) gummed reinforced box tape, (7) waxing stock, (8) glassine or greaseproof paper, (9) cellophane, (10) any other type of paper or paperboard of which the company's purchases that year exceeded $500,000.

(b) Furnish the same information for 1957.

(c) For each type of material listed in (a), give the total dollar value of Pollock's purchases in 1954 and the value of its purchases from each supplier listed in your answer to that question.

(d) For each type of material listed in your answer to (b), give the total dollar value of Pollock's purchases in 1957, and the value of its purchases from each of the suppliers listed in your answer to question (b).

(e) For each type of material listed in (a), give the proportion of Pollock's total requirements during 1954 [fol. 47] (1) produced and supplied by Pollock itself, (2) obtained from St. Regis or subsidiaries of St. Regis, including R-W Paper Company, and (3) purchased from other suppliers.

(f) For each type of material listed in your answer to (b), give the corresponding information for 1957.

(g) Describe the extent to which cellophane is used by Pollock as a substitute for waxed paper in the manufacture of bread wraps.

6. (a) Describe any changes which have been made in the character and scope of Pollock's operations since St. Regis acquired control of the company.

(b) Briefly describe major improvements in and additions to the productive facilities of Pollock since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged or has been altered to permit the manufacture of different products.

7. Give your understanding of the reasons which caused the stockholders of Pollock Paper Corporation to sell their securities or to exchange their securities for those of St. Regis.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary.

[fol. 48]

EXHIBIT G, ANNEXED TO COMPLAINT

Jan. 9, 1959

Rhinelander Paper Company,
Rhinelander, Wisconsin.

ORDER REQUIRING FILING OF SPECIAL REPORT

Re: File No. 5510696.

Gentlemen:

Pursuant to a resolution of the Federal Trade Commission dated January 6, 1959, and entitled "Resolution Directing Investigation of the Acquisition by St. Regis Paper Company of the Stock or Assets, or Both the Stock and Assets, of Other Corporations," a copy of which is enclosed, you are ordered to submit a special report to the Commission within thirty days, containing the information and documents specified in the following questions.

In your answer, please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

1. Furnish the correct title, mailing address, date and state of incorporation of Rhinelander Paper Company.

[fol. 49] 2. Submit photostat copies or certified true copies of the following materials:

(a) Contracts, options, and agreements relating to the acquisition of a controlling stock interest in Rhinelander Paper Company by St. Regis Paper Company.

(b) Contracts, agreements, and correspondence between Rhinelander and Weyerhaeuser Timber Co. concerning the establishment and operation of the R-W Paper Co.

(c) Correspondence, internal office memoranda and special reports prepared by or for Rhinelander in connection with the acquisition. You may omit materials relating

solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided they contain no annotations relevant to the negotiations between Rhinelander, its stockholders, and St. Regis.

(d) All reports, memoranda or correspondence received by Rhinelander from officials or employees of R-W Paper Company since January 1, 1956, concerning R-W's

(1) Production

(2) Sales

(3) Shipments

(4) Profit and/or loss from operations

(5) Establishment of its sales force

[fol. 50]

(6) Customers formerly supplied by Rhinelander on the Pacific Coast.

With reference to (1) through (4) what the Commission requires are annual totals insofar as the data are available in that form. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

(e) Profit and loss statements and year-end balance sheets of R-W Paper Company for the years 1956 and 1957, and of Rhinelander for the year 1957, together with all supporting statements or explanatory notes.

(f) Minutes of meetings of the Board of Directors of Rhinelander and of other formal and informal committee actions relating to the acquisition.

(g) The last Rhinelander catalog or description of Rhinelander's products issued prior to the date St. Regis Paper Company acquired control.

3. Submit photo copies or certified true copies of the following materials:

(a) Schedules submitted to the Bureau of the Census for the 1957 Annual Survey of Manufactures.

(b) Schedules submitted by Rhinelander to any trade association or to any individual or firm collecting data on sales, orders, deliveries, and/or inventories of similar products from several manufacturers and preparing reports thereon for the period since January 1, 1956.

[fol. 51] (c) All statistical summaries or reports prepared by a trade association, individual, or firm, and based on the type of data referred to in question 3(b).

(d) Correspondence with the data collecting agency clarifying or amending (1) any of the schedules or reports referred to in (a), (b) and (c), and (2) the schedules submitted to the Bureau of the Census for the 1954 Census of Manufactures.

With reference to (b), and (c) and (d), what the Commission requires is annual totals for each of the years specified, plus schedules and reports for the period subsequent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

4. (a) Report the total sales or the total value of shipment of Rhinelander in 1955 and the Company's sales or the value of its shipments, of each product or product line. You may omit product lines comprising less than 5 percent of Rhinelander's total sales provided the omitted lines do not aggregate more than 7½ percent of Rhinelander's total sales.

(b) For each product or product line listed in your answer to question 4(a), (1) identify the area to which Rhinelander normally made shipments in 1955, (2) give the names and addresses of Rhinelander's twenty largest customers in 1955 and its sales or the value of its shipments of the particular product or product line to each of them during that year.

[fol. 52] (c) Report the information specified in (a) and (b) for the year 1957.

5. (a) Describe Rhinelander's method of distribution in 1955 and describe any changes which have been made in the method of distribution since St. Regis acquired control of the Company.

(b) Describe any changes which have been made in the character and scope of Rhinelander's manufacturing operations since St. Regis acquired control of the company, and indicate the extent to which the company's productive capacity has been enlarged, or has been altered to permit the manufacture of different products.

6. Give your understanding of the reasons which caused the stockholders of Rhinelander to sell their securities, or to exchange their securities for those of St. Regis.

By direction of the Commission.

(Sgd.) ROBERT M. PARRISH,
Secretary.

[fol. 53]

EXHIBIT H, ANNEXED TO COMPLAINT

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

JOHN W. GWYNNE, Chairman
ROBERT T. SECREST
SIGURD ANDERSON
WILLIAM C. KERN
EDWARD T. TAIT

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY.

ORDER DENYING MOTION TO VACATE

Counsel for St. Regis Paper Company, by motion filed January 22, 1959, having requested the Commission to

vacate its resolution of January 6, 1959, and its orders of January 9, 1959, requiring St. Regis Paper Company and certain other corporations to file special reports described in said orders, and the Commission having duly considered the matter and determined for reasons stated in the ac-
[fol. 54] companying memorandum that said motion should be denied:

IT IS ORDERED that the motion be, and it hereby is, denied:

IT IS FURTHER ORDERED that the reports originally required to be filed within thirty days after service of the Commission's orders of January 9, 1959, be filed on or before May 28, 1959.

By the Commission.

(Sgd.) ROBERT M. PARRISH
Robert M. Parrish,
Secretary.

(SEAL)

ISSUED: May 6, 1959

[fol. 55]

EXHIBIT I, ANNEXED TO COMPLAINT

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

ROBERT T. SECREST, Acting Chairman

SIGURD ANDERSON

WILLIAM C. KERN

EDWARD T. TAIT

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY

RESOLUTION BROADENING THE INVESTIGATION OF ST. REGIS PAPER COMPANY INITIATED BY RESOLUTION DATED JANUARY 6, 1959

WHEREAS, the Commission, by its resolution dated January 6, 1959, initiated an investigation, for the purposes stated in the resolution, of the organization, business, conduct, practices, and management of St. Regis Paper Company and of the corporations whose stock or assets, or both stock and assets, had been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and

WHEREAS, the Commission has information to the effect that St. Regis Paper Company has acquired since January [fol. 56] 6, 1959, or proposes to acquire, the stock or assets, or both the stock and assets, of Northwest Door Company and Cupples-Hesse Corporation, corporations engaged in interstate commerce and subject to the jurisdiction of the Commission; and

WHEREAS, the Commission believes that it is in the public interest to broaden its said investigation to determine the effect upon competition of the acquisitions or proposed acquisitions mentioned in the preceding paragraph:

NOW, THEREFORE, BE IT RESOLVED that the investigation initiated by the Commission's resolution dated January 6, 1959, be, and it hereby is, broadened to include investigation of the acquisition or proposed acquisition by St. Regis Paper Company of the stock or assets, or both the stock and assets, of Northwest Door Company and Cupples-Hesse Corporation, and to include investigation of the organization, business, conduct, practices, and management of Northwest Door Company and Cupples-Hesse Corporation and the relation of St. Regis Paper Company, Northwest Door Company, and Cupples-Hesse Corporation to each other and to other corporations.

By the Commission.

(Sgd.) ROBERT M. PARRISH,
Robert M. Parrish,
Secretary.

(SEAL)

Dated: June 4, 1959.

[fol. 57]

EXHIBIT J, ANNEXED TO COMPLAINT

June 8, 1959

St. Regis Paper Company,
150 East 42nd Street,
New York 17, New York.

ORDER REQUIRING FILING OF SPECIAL REPORT.

Re: File No. 5510696.

Gentlemen:

Pursuant to a resolution of the Federal Trade Commission dated June 4, 1959, a copy of which is enclosed, you are ordered to submit a special report to the Commission within thirty days, containing the information and documents specified in the following questions.

In your answer please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

Wherever information pertaining to an acquired company is requested for a period subsequent to the merger of that company into your company or a subsidiary of your company, the specified information is to be provided for the plants operated by the acquired companies at the time of their acquisition, in whatever form the plants existed during the period for which the information is requested.

Throughout this order references to "St. Regis Paper Company", "St. Regis" or "your company" shall include St. Regis Paper Company and all subsidiaries of St. Regis doing business in the United States, its territories and possessions, and references to "Cupples-Hesse Corpora-
[fol. 58] tion" shall include all subsidiaries of Cupples-Hesse Corporation doing business in the United States, its territories and possessions.

1. Submit photo copies or certified true copies of the following materials:

(a) Contracts, options and agreements of your company or a subsidiary of your company relating to the proposed acquisition of a controlling interest in Northwest Door Company of Tacoma, Washington, with the exception of the agreement of November 25, 1958, and a letter of Mr. C. John Newlands to your company dated November 25, 1958. Copies of these two documents already have been furnished the Commission.

(b) Contracts, options and agreements of your company or a subsidiary of your company relating to the proposed acquisition of a controlling interest in Cupples-Hesse Corporation of St. Louis, Missouri, and the acquisition of a controlling interest in its subsidiaries.

(c) Correspondence, internal office memoranda, and special reports prepared by or for your company or a subsidiary of your company relating to the acquisition of either Northwest Door Company or Cupples-Hesse Corporation. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided such items contain no annotations relevant to the negotiations between the company subsequently acquired, its stockholders and St. Regis.

(d) The annual report of your company for 1958 and of each prospectus issued since January 9, 1959.

[fol. 59] 2. Submit photo copies of:

(a) Schedules submitted by your company for the 1958 Census of Manufactures.

(b) Any correspondence amending or clarifying your reports on these schedules

3. For each product or product line of your company which can be used by Northwest Door report:

(a) The area to which you normally made shipments in 1958.

(b) The names and addresses of your 20 principal customers in 1958.

(c) Your 1958 sales, or the value of your 1958 shipments, to Northwest Door Company, to each of these 20 customers, and to all customers.

4. For each product or product line of your company which can be used by Cupples-Hesse Corporation, report the information specified in question 3, substituting "Cupples-Hesse Corporation" for "Northwest Door Company" in part (c).

5. Explain how the business and productive facilities of Northwest Door Company and of Cupples-Hesse Corporation would be fitted into the operations of your company.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary.

(SEAL)

[fol. 60]

EXHIBIT K, ANNEXED TO COMPLAINT

June 8, 1959

Cupples-Hesse Corporation,
4819 Kingshighway Memorial Boulevard,
St. Louis 15, Missouri.

ORDER REQUIRING FILING OF SPECIAL REPORT.

Re: File No. 5510696.

Gentlemen:

Pursuant to resolutions of the Federal Trade Commission dated January 6 and June 4, 1959, copies of which are enclosed, you are ordered to submit a special report to the Commission within 30 days, containing the information and documents specified in the following questions.

References to "Cupples-Hesse Corporation", "Cupples-Hesse", or "your company" should be understood to include all subsidiaries of Cupples-Hesse Corporation. References to "St. Regis Paper Company" or "St. Regis" should be

understood to include all subsidiaries of St. Regis Paper Company.

In your answer, please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

1. Furnish the correct title, mailing address, date and state of incorporation of Cupples-Hesse Corporation.

2. Submit photo copies or certified true copies of the following materials:

(a) Contracts, options and agreements relating to St. [fol. 61] Regis' acquisition of a controlling stock interest in Cupples-Hesse Corporation.

(b) Correspondence, internal office memoranda and special reports prepared by or for your company in connection with the acquisition. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided they contain no annotations relevant to the negotiations between Cupples-Hesse Corporation, its stockholders, and St. Regis.

(c) Annual reports of Cupples-Hesse for the last three years, or if the company made no annual reports, income statements and year-end balance sheets, together with all supporting statements and explanatory notes.

(d) Minutes of meetings of the Board of Directors of Cupples-Hesse, and of other formal and informal committee actions relating to the acquisition.

(e) The most recent product catalog or description of Cupples-Hesse products.

(f) The most recent Cupples-Hesse release of each of the following issued during the last two years: (1) comprehensive securities registration statement, (2) prospectus, (3) solicitations of proxy statement, and statement listing its securities on any security exchange.

3. Submit photo copies or certified true copies of the following materials:

(a) Schedules submitted by Cupples-Hesse to the Bureau of the Census for the 1958 Census of Manufactures, [fol. 62] and for the 1956 and 1957 Annual Survey of Manufactures, except that where the 1957 schedule for the Annual Survey of Manufactures contains data for the value of 1956 shipments of each class of products, the 1956 schedule need not be submitted.

(b) Schedules submitted by Cupples-Hesse to any trade association or to any individual or firm collecting data on sales, orders, deliveries, and/or inventories of similar products from several manufacturers and preparing reports thereon for the period since January 1, 1957.

(c) All statistical summaries or reports prepared by a trade association, individual or firm and based on the type of data referred to in question 3(b).

(d) Correspondence with the data collecting agency clarifying or amending any of the schedules or reports referred to in (a), (b), and (c).

With reference to (b), (c) and (d), what the Commission requires is annual totals for each of the years specified, plus schedules and reports for the period subsequent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

4. List the specific properties of Cupples-Hesse Corporation of which St. Regis acquired control; identify each plant and (a) show its location, (b) describe its principal productive equipment, and (c) give its rated capacity.

5. (a) Report the total sales or the total value of shipments of Cupples-Hesse Corporation in 1958, and the com- [fol. 63] pany's sales or the value of its shipments, of each product or product line. You may omit product lines comprising less than 5 percent of Cupples-Hesse Corporation's total sales provided the omitted lines do not aggregate more than 7½ percent of Cupples-Hesse Corporation's total sales.

(b) For each product or product line listed in your answer to question 5(a): (1) describe the method by which Cupples-Hesse Corporation distributed its output during 1958; (2) identify the area to which you normally made shipments in 1958; (3) give the names and addresses of your chief competitors; (4) give the names and addresses of your twenty principal customers in 1958; and (5) report your 1958 sales or the value of your 1958 shipments to St. Regis Paper Company (including St. Regis subsidiaries), to R-W Paper Company, and to each of these twenty customers.

6. For each product or product line of St. Regis Paper Company (including its subsidiaries) which can be used by Cupples-Hesse Corporation, report the value of its 1958 purchases (a) from all companies, and (b) from St. Regis Paper Company, including St. Regis subsidiaries.

7. Give your understanding of the reasons which caused the stockholders of Cupples-Hesse Corporation to sell their securities, or to exchange their securities for those of St. Regis.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary.

[SEAL]

[fol. 64]

EXHIBIT L, ANNEXED TO COMPLAINT

June 8, 1959

Northwest Door Company,
1203 East D Street,
Tacoma, Washington.

ORDER REQUIRING FILING OF SPECIAL REPORT.

Re: File No. 5510696.

Gentlemen:

Pursuant to resolutions of the Federal Trade Commission dated January 6 and June 4, 1959, Copies of which

are enclosed, you are ordered to submit a special report to the Commission within 30 days, containing the information and documents specified in the following questions.

References to "Northwest Door Company" or "your company" should be understood to include any subsidiaries of Northwest Door Company. References to "St. Regis Paper Company" or "St. Regis" should be understood to include all subsidiaries of St. Regis Paper Company.

In your answer, please restate each question with which the corresponding answer is identified. If any question cannot be answered fully, give such information as is available to you and explain wherein and why your answer is incomplete.

1. Furnish the correct title, mailing address, date and state of incorporation of Northwest Door Company.

2. Submit photo copies or certified true copies of the following materials:

(a) Contracts, options, and agreements relating to the [fol. 65] proposed acquisition of a controlling stock interest in Northwest Door Company by St. Regis Paper Company, with the exception of the agreement of November 25, 1958, and a letter of Mr. C. John Newlands to St. Regis Paper Company dated November 25, 1958. Copies of these two documents already have been furnished the Commission.

(b) Correspondence, internal office memoranda and special reports prepared by or for Northwest Door Company in connection with the proposed acquisition. You may omit materials relating solely to contracts and agreements with labor unions, and items of correspondence devoted exclusively to appointments, acknowledgment of the receipt of materials, or expressions of appreciation for courtesies, provided they contain no annotations relevant to the negotiations between Northwest Door Company, its stockholders, and St. Regis.

(c) Profit and loss statements and year-end balance sheets of Northwest Door Company for the years 1957 and 1958, together with all supporting statements or explanatory notes. In the event that September 30 is the end of

your fiscal year, you may omit the balance sheet of September 30, 1958, as a copy of this document already has been furnished the Commission. However, we are not in possession of any supporting statements or explanatory notes that may have been prepared with reference to this balance sheet.

(d) Minutes of meetings of the Board of Directors of Northwest Door Company and of other formal and informal committee actions relating to the acquisition.

(e) The most recent Northwest Door Company catalog or description of its products.

[fol. 66] 3. Submit photo copies or certified true copies of the following materials:

(a) Schedules submitted to the Bureau of the Census for the 1957 Annual Survey of Manufactures and the 1958 Census of Manufactures.

(b) Schedules submitted by Northwest Door Company to any trade association or to any individual or firm collecting data on sales, orders, deliveries, and/or inventories of similar products from several manufacturers and preparing reports thereon for the period since January 1, 1957.

(c) All statistical summaries or reports prepared by a trade association, individual, or firm, and based on the type of data referred to in question 3(b).

(d) Correspondence with the data collecting agency clarifying or amending (1) any of the schedules or reports referred to in (a), (b) and (c), and (2) the schedules submitted to the Bureau of the Census for the 1958 Census of Manufactures.

With reference to (b), (c) and (d), what the Commission requires is annual totals for each of the years specified, plus schedules and reports for the period subsequent to the close of the last statistical year. Where certain schedules and reports contain annual totals for all the categories of information, copies of the interim reports are unnecessary.

4. (a) Furnish a list of Northwest Door Company's plants, and for each plant report its location, its principal product lines and its rated capacity for each product line.

[fol. 67] (b) For commercial forest lands owned or controlled (under lease or cutting rights) by Northwest Door Company report:

(1) The location and acreage by county and state.

(2) The location in relation to commercial forest lands owned and controlled by St. Regis.

(3) The net volume of live saw timber on such commercial forest lands in board feet distributed by state for:

Douglas Fir,
Ponderosa Pine,
Hemlock,
Lodge Pole Pine,
Spruce,
Other species.

(c) Furnish complete details on the production and sale of pulp wood, chips, or sawmill waste to pulp or paper mills for the years 1957 and 1958.

5. (a) Report the total sales or the total value of shipments of Northwest Door Company in 1958, and the company's sales or the value of its shipments, of each product or product line. You may omit product lines comprising less than 5 percent of Northwest Door Company's total sales provided the omitted lines do not aggregate more than 7½ percent of Northwest Door Company's total sales.

[fol. 68] (b) For each product or product line listed in your answer to question 5(a): (1) describe the method by which Northwest Door Company distributed its output during 1958; (2) identify the area to which you normally made shipments in 1958; (3) give the names and addresses of your chief competitors; (4) give the names and addresses of your twenty principal customers in 1958; and (5) report your 1958 sales or the value of your 1958 shipments to St. Regis Paper Company (including St. Regis subsidiaries), to R-W Paper Company, and to each of these twenty customers.

6. For each product or product line of St. Regis Paper Company (including its subsidiaries) which can be used by Northwest Door Company, report the value of its 1958 purchases (a) from all companies, and (b) from St. Regis Paper Company, including St. Regis subsidiaries.

7. Give your understanding of the reasons which caused the stockholders of Northwest Door Company to sell their securities, or to exchange their securities for those of St. Regis.

By direction of the Commission.

ROBERT M. PARRISH,
Secretary

[SEAL]

[fol. 69]

EXHIBIT M, ANNEXED TO COMPLAINT

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

EARL W. KINTNER, Chairman,

ROBERT T. SECREST

SIGURD ANDERSON

WILLIAM C. KERN

EDWARD T. TAIT

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO ST. REGIS PAPER COMPANY

WHEREAS, the Federal Trade Commission on January 6, 1959, pursuant to the authority granted in subsections (a)

and (b) of Section 6 of the Federal Trade Commission Act (15 U. S. C., Sec. 46(a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp. 1.1 et seq.), adopted a resolution directing an investigation, for the purposes stated in the resolution, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and [fol. 70] the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on January 9, 1959, pursuant to the said resolution, issued its orders requiring St. Regis Paper Company to submit to the Commission within thirty days a special report containing the information and documents specified in the order; and

WHEREAS, the said resolution and the said order requiring the special report were served on St. Regis Paper Company by registered mail on January 12, 1959; and,

WHEREAS, the Commission on March 5, 1959, issued, and on March 7, 1959, served on St. Regis Paper Company by registered mail, its order suspending the directions contained in the Commission's said order requiring the special report pending further consideration of a motion to vacate the said order filed by St. Regis Paper Company on January 22, 1959; and,

WHEREAS, the Commission, on May 6, 1959, issued its opinion and order denying the said motion, and directing that the special report originally required to be filed within thirty days after service of the said order of January 9, 1959, be filed on or before May 28, 1959; and,

WHEREAS, the Commission's said opinion and order of May 6, 1959, were served on St. Regis Paper Company by registered mail on May 7, 1959; and,

WHEREAS, St. Regis Paper Company has failed to file the special report required by the said order of January 9, 1959, on or before May 28, 1959, or at any time there-

after prior to the date of this notice of default, and no [fol. 71] additional time having been granted by the Commission for the filing of the said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U. S. C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

NOW, THEREFORE, you, St. Regis Paper Company, are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before May 28, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated January 9, 1959.

By the Commission.

(Sgd.) ROBERT M. PARRISH,
Secretary.

[SEAL]

Issued: June 18, 1959

[fol. 72]

EXHIBIT N, ANNEXED TO COMPLAINT

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

EARL W. KINTNER, Chairman,

ROBERT T. SECREST

SIGURD ANDERSON

WILLIAM C. KERN

EDWARD T. TAIT

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO ST. REGIS PAPER COMPANY

WHEREAS, the Federal Trade Commission on June 4, 1959, pursuant to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (15 U. S. C., Sec. 46 (a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp. 1.1 et seq.), adopted a resolution which broadened the investigation, initiated by a resolution adopted by the Commission on January 6, 1959, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, [fol. 73] and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on June 8, 1959, pursuant to the said resolution adopted June 4, 1959, issued its order requiring St. Regis Paper Company to submit to the Commission within thirty days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolution initiating the investigation, adopted January 6, 1959, was served on St. Regis Paper Company by registered mail on January 12, 1959, and the said resolution broadening the investigation, adopted June 4, 1959, and the said order requiring a special report, issued June 8, 1959, were served on St. Regis Paper Company by registered mail on June 9, 1959; and,

WHEREAS, St. Regis Paper Company has failed to file the special report required by the said order of June 8, 1959, on or before July 9, 1959, or at any time thereafter prior to the date of this notice of default, and no additional time having been granted by the Commission for the filing of the said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U. S. C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and [fol. 74] such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

NOW, THEREFORE, you, St. Regis Paper Company, are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before July 9, 1959, or at any time thereafter, the special report containing the information

and documents required by the said order of the Federal Trade Commission dated June 8, 1959.

By the Commission.

(Sgd.) Robert M. Parrish,
Secretary.

[Seal]

Issued: July 22, 1959.

[fol. 76]

In United States District Court

Southern District of New York

Civil Action No. 150-271

United States of America, Plaintiff,

v.

St. Regis Paper Company, Defendant.

Defendant's Answer—Filed October 23, 1959

The defendant St. Regis Paper Company, by its attorneys LeBoeuf, Lamb & Leiby, answering the complaint herein:

Answer to Count One

1. Admits the allegations of the paragraphs of the complaint designated 2 and 3.

2. Except as hereinafter admitted, denies it has any knowledge or information sufficient to form a belief as to the allegations of the paragraph designated 1, and the paragraphs designated 4 to 11, inclusive.

3. Denies that the Federal Trade Commission (hereinafter, for convenience, called "the Commission") has lawful power or authority under Section 6(a) and (b) of the Federal Trade Commission Act (15 U. S. C. §46(a) and

(b)) to require defendant or any of the former corporations named in said complaint, to wit, Growers Container Corporation, formerly a California corporation; F. J. Kress Box Company, formerly a Pennsylvania corporation; Pa-[fol. 77] cific Waxed Paper Company, formerly a Washington corporation; Pollock Paper Corporation, formerly a Texas corporation; Rhinelander Paper Company, formerly a Wisconsin corporation and Cupples-Hesse Corporation, formerly a Missouri corporation, all of which corporations, shortly after the acquisition of all of their outstanding capital stocks by defendant, were merged with and into defendant, and Northwest Door Company, a Washington corporation, all of the outstanding capital stock of which is presently owned by defendant, to furnish to the Commission special reports for the purpose of investigating whether the combined effect of the acquisition by defendant of the stocks, or the stocks and assets, of any of the said corporations hereinbefore mentioned, or any of them, may have violated a law administered by said Commission, to wit, Section 7 of the Clayton Act (15 U. S. C. Sec. 18).

4. Denies that said Commission has lawful power or authority to adopt the resolution dated January 6, 1959, a copy of which, consisting of two pages marked exhibits "A-1" and "A-2", is annexed to the complaint; the resolution dated June 4, 1959, a copy of which, consisting of two pages marked exhibits "I-1" and "I-2", is annexed to the complaint, and the resolution dated June 18, 1959, a copy of which, consisting of two pages marked exhibits "M-1" and "M-2", is annexed to the complaint.

5. Denies that the Commission has lawful power or authority to require defendant to furnish said Commission the answers to the numerous questions or the documents, records and information, as requested in the Commission's letters dated January 9, 1959 addressed to the defendant and to said Growers Container Corporation, F. J. Kress [fol. 78] Box Company, Pacific Waxed Paper Company, Pollock Paper Corporation and Rhinelander Paper Company, and in the Commission's letters dated June 8, 1959, addressed to defendant, Cupples-Hesse Corporation and Northwest Door Company, copies of the pages of which

letters, marked, respectively, exhibits "B-1", "B-2", "B-3", "B-4", "B-5", "B-6", "B-7", "B-8", "B-9", "B-10", "B-11", "C-1", "C-2", "C-3", "D-1", "D-2", "D-3", "E-1", "E-2", "E-3", "F-1", "F-2", "F-3", "F-4", "G-1", "G-2", "G-3", "J-1", "J-2", "K-1", "K-2", "K-3", "L-1", "L-2", "L-3" and "L-4", are annexed to the complaint.

6. Admits that copies of the said resolutions and of the said letters mentioned in paragraphs 4 and 5 hereof were received by defendant, or defendant's former wholly-owned subsidiary corporations, and by defendant's subsidiary Northwest Door Company.

7. Admits that, except for the documents, records and other information which the defendant voluntarily furnished the Commission prior to and, in part, subsequent to the adoption by the Commission of the said resolutions purporting to order special reports pursuant to said Section 6(b) of the Federal Trade Commission Act, defendant, the said former subsidiary corporations which have been merged with and into defendant, as aforesaid, and its said subsidiary, Northwest Door Company, have not furnished the documents, materials, records and information requested to be furnished said Commission as specified in said letters of the said Commission, copies of which are annexed as exhibits to the complaint.

[fol. 79] Answer to Count Two

8. Except as hereinafter admitted, denies it has any knowledge or information sufficient to form a belief as to the allegations of the paragraphs of the complaint designated 12, 14, 15, 16 and 17, inclusive.

9. Repeats and realleges each and every denial and admission as contained in the paragraphs of this answer numbered 1 to 7, inclusive, with the same force and effect as if herein set forth at length.

10. Denies that the Commission has lawful power or authority under Section 10 of the Federal Trade Commission Act (15 U.S.C. 50), or under any other law, to issue to defendant a notice of alleged default in filing spe-

cial reports required by defendant by the Commission's purported "orders" dated January 9, 1959 and June 8, 1959, copies of which, marked exhibits "M" and "N", are annexed to the complaint herein.

11. Admits that on or about June 21 and July 25, 1959, defendant received by registered mail copies of said exhibits "M" and "N" and that, except as alleged in paragraph 7 of this answer, defendant and its said subsidiary Northwest Door Company have not filed any reports as purportedly required by said purported "orders" of the Commission.

12. Denies that defendant is in default in any respect in furnishing any report or any other document, record or any other information lawfully requested by the Commission.

Affirmative Defenses

13. *As and for a first, separate and complete affirmative defense* to each and every cause of action alleged in the [fol. 80] complaint, defendant alleges that the allegation of Count One and Count Two of the complaint fail to state a claim upon which relief can be granted.

14. *As and for a second, separate and complete affirmative defense* to each and every cause of action alleged in the complaint, defendant alleges, on information and belief:

(a) that in adopting the said resolutions, copies of which are annexed as exhibits to the complaint, and in issuing the said several letters and said notices of default, copies of which are annexed as exhibits to the complaint, the Commission acted in contravention of the specific prohibition of Section 6(b) of the Federal Administrative Procedure Act (5 U.S.C. §1105, (b)), providing as follows:

> "(b) *Investigations.*—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law • • • ", and

(b) that the said resolutions, said letters entitled "orders" and said "notices of default" issued by the Commission, as aforesaid, are without any force or effect in law.

15. *As and for a third, separate and complete affirmative defense* to the claim alleged in Count One of the complaint, defendant alleges, on information and belief, that the special reports, as required by the Commission, do not conform to constitutional standards, in that the requirements thereof are unreasonable, oppressive, improper in scope and repetitious, and require the furnishing to the Commission of (a) the names and addresses of defendant's and defendant's said subsidiary's largest customers which [fol. 81] the Commission will publish (by verification with such customers) in contravention of the provisions of Section 6(f) of the said Federal Trade Commission Act, and (b) copies of the defendant's reports to the Census of Manufacturers which are confidential and privileged information under the Census Act (13 U. S. C. §131).

16. *As and for a fourth, separate and complete affirmative defense* to the claim alleged in Count Two of the complaint, defendant alleges, on information and belief, that plaintiff is construing the provisions of Section 10 of the Federal Trade Commission Act (15 U. S. C. §50, *supra*) in a manner which contravenes the due process clause of the Constitution, in that the imposition of the penalties alleged to be payable by defendant under said Section 10 for alleged failure of defendant to file special reports, as required by the Commission under Section 6(b) of the Federal Trade Commission Act, as aforesaid, pending a final determination in the courts of the lawful power of the plaintiff under said Section 6(b) of the Federal Trade Commission Act, is to coerce the defendant into compliance with an asserted power prior to a judicial determination of the validity thereof, thereby depriving defendant of its property and property rights in the information required so to be furnished the Commission without a full and fair hearing and a final judicial determination of the existence of such power by due process of law.

17. *As and for a fifth, separate and complete affirmative defense* to each and every claim alleged in the complaint, defendant alleges:

[fol. 82] (a) that prior to the purported adoption of said resolution dated January 6, 1959, to wit, during the period beginning on or about September 25, 1956, in response to a letter to defendant dated September 7, 1956, signed by Charles E. Stroud, Esq., attorney employed by said Federal Trade Commission, and pursuant to an appointment and conference requested on behalf of defendant, at the office of the Commission in Washington, D. C., defendant voluntarily submitted to and made available for inspection, examination, retention and copying by representatives of said Commission, including, among others, Messrs. Frank C. Hale, Legal Adviser of the Bureau of Investigation, and Edward T. Widman, Attorney for the Bureau of Investigation, copies of numerous documents, records, contracts, agreements, prospectuses forming parts of registration statements filed by defendant with the Securities and Exchange Commission, and other information relating to the acquisition by defendant of the stocks, or stocks and assets, of other corporations acquired by defendant since January 1, 1954, including the stocks of each of the corporations (other than defendant) hereinabove named;

(b) that thereafter, in oral conferences at the office of defendant and defendant's counsel in the City of New York with counsel for said Commission, namely, Charles E. Stroud, Esq., and other representatives of said Commission, defendant voluntarily furnished said Commission additional documents, records and information relating to said acquisitions;

(c) that subsequently, pursuant to a paper designated a "subpoena duces tecum", purporting to have been issued by or on behalf of said Commission, bearing the date Sep- [fol. 83] tember 13, 1957, and returnable before Mr. Albert G. Seidman or said Charles E. Stroud, attorneys employed by said Federal Trade Commission, at the office of said Commission at the United States Court House, Foley

Square, New York, N. Y., and the specifications annexed thereto, defendant voluntarily furnished the said attorneys for the Commission over a period beginning October 7, 1957, through December 13, 1957, a large volume of additional documents, records, papers and instruments constituting a total of 213 separately marked exhibits, all in relation to said acquisitions of the stocks, or stocks and assets, of other corporations made by defendant since January 1, 1954;

(d) that in the stenographic transcript of the return of said subpoena duces tecum, at the last "hearing" thereof before said Commission's attorneys on December 13, 1957, the following was stated by said Mr. Seidman, attorney for the said Commission:

> "Mr. Seidman: It now appearing that with the exception of the census reports which will, when received, be furnished by mail, that the witness has fully responded to all specifications of the subpoena to the extent that the papers, documents and records requested were within his control, as Secretary of St. Regis Paper Company, this hearing is terminated • • • and Mr. Crawford is relieved from further obligation under the subpoena duces tecum subject to his furnishing the copies of the census reports, when received."
>
> (Whereupon, at 12:05 p.m., December 13, 1957, the hearing in the above-entitled matter was concluded.);

[fol. 84] (e) that thereafter, pursuant to a letter dated June 30, 1958 and the memorandum annexed thereto, signed by said Charles E. Stroud, an attorney employed by the Federal Trade Commission, New York Branch Office, addressed to defendant's counsel, defendant furnished additional information regarding the acquisition by defendant of the stocks, or stocks and assets, of other corporations since January 1, 1954, as requested by said attorney, excepting, among other things, however, the names and addresses of the 10 largest customers of defendant and of all other corporations whose stocks had theretofore been acquired by defendant, the dollar volume of sales to each such customer for the years 1955, 1956 and 1957 and the names and

addresses of suppliers of more than 5% of certain paperboard commodities purchased by defendant and said other corporations during said period;

(f) that in a conference with said attorney, Mr. Stroud, at the office of defendant's counsel in New York, defendant's counsel requested that the Commission's said attorney ascertain whether the Commission would be willing to accept, in lieu of the actual names and addresses of said 10 largest customers and said suppliers, designations of such customers and suppliers by symbols rather than actual names and addresses, for the reason that such actual names and addresses are confidential, and the disclosure thereof, especially for the purpose requested by the Commission's said attorney, namely to make verification of said sales and purchases by personal interviews with said customers and suppliers, would be harmful to defendant's relationship with said customers and said suppliers and might result in losses and reduction of sales and of losses [fol. 85] and reductions of supplies of various commodities required by defendant and said other corporations, but at no time thereafter has the Commission or its said attorney or any other representative of the Commission made answer to the inquiry made by defendant's counsel, as aforesaid;

(g) that thereafter defendant and its counsel furnished said Commission and its representative additional documents and records in connection with the Commission's investigation to determine whether any of the acquisitions by defendant of the stocks or stocks and assets of other corporations presented any question under Section 7 of the Clayton Act (15 U. S. C. §18);

(h) that all of the information has been furnished said Commission on a voluntary basis in accordance with the Commission's published rules and without any application to a United States District Court or any other court or other compulsory process for enforcement of compliance with the Commission's said subpoena duces tecum hereinabove mentioned;

(i) that on the basis of the documents, records and information previously furnished the Commission by de-

fendant, as aforesaid, the Commission could have reached a determination long prior to the adoption of the said resolutions, as annexed to said complaint, and prior to the commencement of this action, that none of the said acquisitions by defendant presented any question of violation of Section 7 of the Clayton Act;

(j) that promptly after the issuance by the Commission of its said resolution dated January 6, 1959, adopted without any prior notice to defendant or any opportunity [fol. 86] of defendant to be heard thereon, defendant, by its counsel, has made numerous motions and applications to set aside and vacate said resolutions and the further resolutions, copies of the pages of which, marked exhibits "M-1", "M-2", "N-1", and "N-2" are annexed to the complaint and entitled "Notice of Default to St. Regis Paper Company", on the ground that said resolutions and orders (letters) pursuant thereto are repetitious, unreasonable and contrary to law, and that said notices of default are without any legal validity, all as set forth in a series of letters, motions, petitions and briefs written and submitted to said Commission during the period subsequent to the receipt of a copy of the Commission's said resolution of January 6, 1959 and letters in the form of "orders" dated January 9, 1959, requiring special reports pursuant to Section 6(b) of the Federal Trade Commission Act;

(k) that all of said motions and applications have been denied by the Commission without granting defendant any opportunity for a hearing, and that, in addition, defendant's requests for conferences with representatives of the Commission to have determined amicably the legal question involved have been unavailing, all as appears from the extensive correspondence between defendant's counsel and the Commission during said period, down to and including the most recent letter dated September 10, 1959 to the Honorable Daniel J. McCauley, Jr., General Counsel of the Federal Trade Commission, reference to all of which is hereby made for a fuller and complete statement thereof; and

(l) that, in the circumstances, the claim attempted to be stated in Count One of the complaint is without any

[fol. 87] merit whatsoever and states no grounds for the granting of equitable relief whether by mandatory injunction or otherwise against defendant.

18. *As and for a sixth, separate and complete affirmative defense* to each and every claim alleged in the complaint herein, defendant alleges that the said resolutions adopted by the Commission and the "orders" issued thereon show upon their face that they are not intended as special reports to furnish to the Commission information "as to the organization, business, conduct, practices, management, and relation [of the defendant] to other corporations, partnerships, and individuals * * *" as intended by said Section 6(b) of the Federal Trade Commission Act, but on the contrary are intended as reports to enable the Commission to enforce compliance with the provisions of Section 7 of the Clayton Act (15 U. S. C. §18) and are therefore outside the intent of Congress in enacting said Section 6(b) of the Federal Trade Commission Act.

19. *As and for a seventh, separate and complete affirmative defense* to the claims alleged in the complaint, defendant alleges, on information and belief, that in the administration and the enforcement of the provisions of said Section 7 of the Clayton Act by the Commission, the authority and powers of the Commission are specifically prescribed by the provisions of said Clayton Act and do not include a power to require special written reports or answers in writing to specific requests, as demanded by the Commission as aforesaid.

20. *As and for an eighth, separate and complete affirmative defense* to each of the claims alleged in the complaint, [fol. 88] defendant alleges, on information and belief, that, as appears from the legislative history of Section 6(a) and (b) of the Federal Trade Commission Act and the words used in said sections, said sections were intended to relate to annual and special reports from corporations to obtain information regarding the "organization, business, conduct, practices, and management" of corporations in interstate commerce and their "relations to other corporations and to individuals, associations and partnerships" for the pur-

pose of making economic investigations; that other provisions of said Section 6, namely, subdivisions (c), (d) and (e), by their express terms, confer a power upon the Commission relating to investigations of alleged violations of any of the antitrust acts, one of which is the Clayton Act, upon the direction of the President or either House of Congress (as provided in subdivision (d)), to investigate whether a final decree entered against a defendant in a suit by the United States to prevent and restrain any violation of the antitrust acts of the manner in which the decree has been or is being carried out, either on the initiation of the Commission or upon the application of the Attorney General (as provided in subdivision (c)); and also on the application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating any antitrust acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law (as provided in subdivision (e)); that such specific provisions in (c), (d) and (e) and the omission of any reference in said subdivisions (a) and (b) of said Section 6 to the antitrust acts, including the Clayton Act, exclude from the Commission powers any [fol. 89] power to require special reports from defendant and its said subsidiary under subdivision (b) of said Section 6 of the Federal Trade Commission Act.

21. *As and for a ninth, separate and partial defense* to the claim asserted in Count Two of the complaint, defendant alleges, on information and belief, that assuming *arguendo* the Commission may lawfully require special reports from defendant pursuant to said Section 6(b) of the Federal Trade Commission Act and that plaintiff may claim a default under said Section 10 of the Federal Trade Commission Act for failure to furnish said reports, both of which claims are denied by defendant, by issuing two separate alleged notices of default and causing the same to be served upon defendant and claiming two separate alleged defaults for such alleged failure, plaintiff has improperly and unlawfully claimed two separate defaults and penalties at the rate of $100 per day for each and every

day of each such alleged default, whereas, conceding *arguendo*, but not admitting plaintiff's right to claim a default, such claim may not properly be subdivided into more than one separate and distinct default and plaintiff may not claim more than one penalty therefor, and that in claiming two separate defaults and two separate penalties plaintiff has oppressively, unreasonably and improperly attempted to enlarge the amount of any penalties which, conceding *arguendo*, but not admitting plaintiff's right thereto, may be claimed against this defendant.

Wherefore, defendant St. Regis Paper Company demands judgment herein, dismissing the complaint and each of the two separate counts alleged therein and granting [fol. 90] defendant such other, further, different and additional relief, together with the costs and disbursements of this action, as may be just and proper.

LeBoeuf, Lamb & Leiby, Attorneys for Defendant, St. Regis Paper Company, 15 Broad Street, New York 5, N. Y., By Horace R. Lamb, A Member of Said Firm.

[fol. 91]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STIPULATION OF FACTS AND PRE-TRIAL ORDER—
January 22, 1960

The following facts are hereby stipulated by the parties hereto for the purpose of the trial of the action herein, subject to all pertinent objections to admissibility which may be interposed at the trial:

1. That on September 7, 1956, defendant St. Regis Paper Company ("St. Regis") received a letter dated September 7, 1956, from the Federal Trade Commission ("Commission"), signed by Charles E. Stroud, Attorney in the New York Office of the Commission. A true copy of said letter is annexed hereto as Exhibit 1, and a true copy of a letter dated September 7, 1956, signed by Homer Crawford, Secretary of St. Regis, acknowledging receipt of the Com-

mission's letter dated September 7, 1956, is annexed hereto as Exhibit 2.

2. That subsequent to September 7, 1956, Mr. Horace R. Lamb, counsel for St. Regis, called Mr. Frank C. Hale, Legal Adviser, Bureau of Investigation of the Commission, by telephone, and requested a conference. Pursuant to arrangements made during said telephone call, Mr. Lamb on September 25, 1956, conferred with Mr. Hale, Mr. Edward T. Widmann, Project Attorney, and Miss Edna Knopp, Economist, Bureau of Investigation of the Commission, in the offices of the Commission in Washington, D. C.

3. That in the course of said conference, Mr. Lamb discussed the history and business of St. Regis and the ac- [fol. 92] quisitions by St. Regis of the stocks and/or assets of various corporations. Mr. Lamb exhibited to the conferees registration statements which had been filed by St. Regis with the Securities and Exchange Commission and pointed out that said registration statements contained descriptions of the business and operations of some of the corporations whose stock had been acquired by St. Regis.

4. That during said conference, Mr. Lamb stated that each of the acquisitions by St. Regis had been examined by counsel for St. Regis and by counsel for the acquired corporations with a view to determining whether a violation of Section 7 of the Clayton Act, as amended, may be involved, and that they had concluded that no violation of said Act was involved.

5. That at said conference, Mr. Lamb was told that schedules or reports submitted by St. Regis and the acquired corporations to the Bureau of the Census for specified years would be accepted in lieu of the data requested in Items 6, 8, 9 and 10 of the letter to St. Regis referred to in paragraph 1 hereof, and that said copies of schedules or reports and all the other information and material requested in said letter should be submitted to Mr. Stroud. At the conclusion of said conference it was the impression of the representatives of the Commission who were present

that St. Regis would furnish the requested information and material.

6. That between September 25, 1956, and January 28, 1957, there were several telephone conversations relating to the status of the said request for information and material between Mr. Lamb and different members of the Commission's staff.

[fol. 93] 7. That on January 28, 1957, a conference attended by Mr. Lamb; Mr. Harold F. Stevens, Assistant Comptroller, St. Regis; Mr. Stroud, and Miss Knopp, was held in the offices of LeBoeuf, Lamb & Leiby, 15 Broad Street, New York, New York. During said conference the following described documents were delivered to Mr. Stroud:

(a) Prospectus of St. Regis Paper Co., dated February 16, 1954, relating to an issue of stock being offered in exchange for stock of Superior Paper Company (January 28, 1957).

(b) Prospectus of St. Regis Paper Co., dated May 26, 1955, relating to an issue of stock being offered in exchange for the stock of Pollock Paper Co. (January 28, 1957).

(c) Prospectus of St. Regis Paper Co., dated July 27, 1955, relating to an issue of stock being offered in exchange for the stock of General Container Corporation (January 28, 1957).

(d) Prospectus of St. Regis Paper Co., dated March 15, 1956, relating to an issue of stock being offered in exchange for the stock of Rhinelander Paper Company (January 28, 1957).

(e) Annual Report, St. Regis Paper Company, 1954 (January 28, 1957).

(f) Annual Report, St. Regis Paper Company, 1955 (January 28, 1957).

(g) Annual Report, Rhinelander Paper Company, 1955 (January 28, 1957).

[fol. 94] 8. That at the said conference on January 28, 1957, it was agreed that, in lieu of providing copies of reports filed with the Bureau of the Census, Mr. Stevens would attempt to assemble copies of the reports submitted to the Bureau of the Census by specified companies and thereafter make such copies of reports available to a representative of the Commission for examination and tabulation.

9. That on March 12, 1957, Mr. Stroud called Mr. Lamb by telephone and inquired as to the status of the request of J. Neils referred to as Exhibits 4, 5, 7 and 8 hereto and that Mr. Lamb said that the information and material assembled by officials of J. Neils had been turned over to him but that he desired to examine and revise the data before submitting same to the Commission. That on March 13, 1957, at a conference in Mr. Lamb's office, Mr. Stroud was furnished a copy of a prospectus of St. Regis dated November 19, 1956, relating to an issue of stock offered in exchange for the stock of J. Neils.

10. That on February 26, 27 and 28, 1957, Mr. William S. Opdyke, Accountant, Bureau of Investigation of the Commission, inspected at the offices of LeBoeuf, Lamb & Leiby, in New York City, the following schedules from St. Regis' Census of Manufacturers Reports:

Census Schedule Number	Plant or Division
MC - 26-A	Jacksonville Pulp Mill, Jacksonville, Florida.
MC - 26-A	Pensacola Pulp Mill, Pensacola, Florida.
MC - 26-A	Tacoma Pulp Mill, Tacoma, Washington.
MC - 26-A	Deferiet Pulp Mill, New York.
MC - 26-A	Sartell Pulp Mill, Minnesota.
MC - 26-A	Bucksport Pulp Mill, Maine.
[fol. 95]	
MC - 26-A	Rhinelander Paper Company, Wisconsin.
MC - 26-B	Watertown Paper Mill, New York.
MC - 26-B	Tacoma Paper and Board Mill, Washington.
MC - 26-B	Pensacola Paper and Board Mill, Florida.
MC - 26-B	Jacksonville Paper & Board Mill, Florida.
MC - 26-B	Carthage Paper Mill, New York.
MC - 26-B	Herrings Paper Mill, New York.
MC - 26-B	East Pepperell Mill, Massachusetts.

Census Schedule Number	Plant or Division
MC - 26-B	Bucksport Paper Mill, Maine.
MC - 26-B	Deferiet Paper Mill, New York.
MC - 26-B	Sartell Paper Mill, Minnesota.
MC - 26-B	Kalamazoo Paper Mill, Michigan.
MC - 26-C	Superior Paper Products Company, Mt. Wolf, Penna.
MC - 26-C	Superior Paper Products Company, Pittsburgh, Penna.
MC - 26-C	Rhinelander Paper Company, Rhinelander, Wisconsin.
MC - 26-C	Pensacola Bag Plant, Pensacola, Florida.
MC - 26-C	Tacoma Bag Plant, Tacoma, Washington.
MC - 26-C	Los Angeles Bag Plant, Los Angeles, California.
MC - 26-C	Nazareth Bag Plant, Nazareth, Pennsylvania.
MC - 26-C	Toledo Bag Plant, Toledo, Ohio.
MC - 26-C	San Leandro Bag Plant, San Leandro, California.
MC - 26-C	Franklin Bag Plant, Franklin, Virginia.
MC - 39-J	Panelyte Molded Plastics Company, Cambridge, Ohio.
MC - 39-J	Trenton Plastics Plant, Trenton, New Jersey.
MC - 39-J	Kalamazoo Plastics Plant, Kalamazoo, Michigan.
MC - 16-B	Rhinelander Paper Company, Rhinelander, Wisconsin.

11. That Exhibits 1 to 12 annexed hereto are true copies of all correspondence and telegrams between St. Regis Paper Company, its counsel, its acquired companies and their counsel on the one hand, and the Commission and its staff on the other hand, between September 7, 1956, and September 16, 1957.

[fol. 96] 12. That on September 16, 1957, the Commission served on Mr. Homer Crawford, Secretary of St. Regis, a subpoena duces tecum returnable before Albert G. Seidman, or Charles E. Stroud at the office of the Federal Trade Commission, U. S. Court House, Foley Square, New York,

New York, on September 27, 1957. A true copy of said subpoena is annexed hereto as Exhibit 13.

13. That by letter dated September 25, 1957, which was received by the Commission on September 27, 1957, St. Regis filed with the Commission a motion to recall, quash and set aside the said subpoena. Said motion was denied by order of the Commission dated October 1, 1957, in which order the return date of the said subpoena was extended to October 7, 1957. True copies of St. Regis' motion papers, and the Commission's orders relating to such motion, are annexed hereto as Exhibits 14 through 16.

14. That on October 7, 1957, October 15, 1957, November 22, 1957, and December 13, 1957, in response to said subpoena duces tecum, Mr. Homer Crawford appeared with counsel, Mr. Horace R. Lamb, before Mr. Albert G. Seidman at the office of the Commission, Room 2904, U. S. Court House, New York, New York. A transcript of the proceedings held on said dates is annexed as Exhibit 17.

15. That in the course of the proceedings on October 7, 1957, October 15, 1957, November 22, 1957 and December 13, 1957, and as enclosures to his letters of October 29 and 30, and November 7, 1957, Mr. Crawford delivered to Mr. Seidman the following Exhibits.

1. Copy of resolutions adopted by the St. Regis Board of Directors at its meeting on April 8, 1955. Eight [fol. 97] pages in length. Resolutions relate to acquisition of Pollock Paper Corp. [Ex. 1]

2. Copy of resolutions adopted by the St. Regis Board of Directors at its meeting on Jan. 25, 1956. Five pages in length. Resolutions relate to the acquisition of Rhinelander Paper Co. [Ex. 2]

3. Extracts from minutes of St. Regis Board of Directors' meeting held Feb. 15, 1956. Three pages in length. These minutes relate to the acquisition of Pacific Waxed Paper Co. [Ex. 3]

4. Certified copies of resolutions adopted by the Board of Directors of St. Regis at meetings held Oct. 17, and Nov. 19, 1956. Five pages in length. These resolu-

tions relate to the acquisition of J. Neils Lumber Co. [Ex. 4]

5. Certified copy of resolutions adopted by the Board of Directors of St. Regis Paper Co., at meetings held Jan. 23, and Feb. 20, 1957. Ten pages in length. These resolutions relate to (1) the acquisition of St. Paul & Tacoma Lumber Co., and (2) the steps necessary for St. Regis securities to be sold in California. [Ex. 5]

6. Agreement dated Dec. 14, 1955, between St. Regis Paper Co. and stockholders of The Gummed Products Co., providing for exchange of stock of the latter company for St. Regis stock. [Ex. 6]

7. Agreement dated March 29, 1956, between St. Regis Paper Co., and stockholders of Pacific Waxed Paper Co. providing for exchange of stock of the latter company for St. Regis' stock. [Ex. 7]

[fol. 98] 8. Offer by St. Regis Paper Co. to exchange stock with certain stockholders of the Pacific Waxed Paper Company. [Ex. 8]

9. Letter agreement between St. Regis Paper Co. and Everett G. Griggs, II, dated Dec. 18, 1956, whereby Mr. Griggs gave St. Regis an option to exchange St. Regis common stock for common stock of St. Paul—Tacoma Lumber Co. [Ex. 9]

10. Registration statement of St. Regis Paper Co., filed with the S.E.C. on April 1, 1957, relating to an issue of stock being offered in exchange for the stock of St. Paul and Tacoma Lumber Company. [Ex. 10]

11. Amendment No. 1, filed 6/19/57, of S.E.C. Registration Statement Form S-1, registered by St. Regis Paper Company, relating to an issue of stock being offered in exchange for the stock of St. Paul and Tacoma Lumber Company. [Ex. 11]

12. Prospectus of St. Regis Paper Co. dated June 24, 1957, relating to an issue of stock being offered in

exchange for the stock of St. Paul and Tacoma Lumber Co. [Ex. 12]

13. Certified copy of extract from minutes of meeting of St. Regis Board of Directors held on Dec. 14, 1955 relating to the acquisition of Gummed Products Co. [Ex. 13]

14. Copy of interoffice memorandum prepared by officials of St. Regis relating to the acquisition of St. Paul-Tacoma Lumber Company. [Ex. 14]

[fol. 99] 15. Letter from Paul M. Dunn to R. K. Ferguson dated April 4, 1956, relating to "Timber and Pulpwood resources Analysis" of St. Paul-Tacoma Lumber Co. prepared by Cloverdale & Colpitts. [Ex. 15]

16. Copy of an inter-company "Report on St. Paul-Tacoma Lumber Company", prepared by R. L. DeLong and addressed to R. K. Ferguson. [Ex. 16]

17. Letter from Richard A. Rave to R. L. DeLong, dated Aug. 15, 1956, entitled "Old Growth Timber Volumes on St. Paul-Tacoma Lumber Company's Lands", with attached "Table Showing Old Growth Timber Volumes on St. Paul-Tacoma Lumber Company Lands". [Ex. 17]

18. Data taken from the Cloverdale & Colpitts analysis of St. Paul-Tacoma Lumber Company's timber resources. [Ex. 18]

19. Annual Reports of St. Regis Paper Co. for the following years: 1950, 1951, 1952, 1953, 1954, 1955 and 1956. [Exs. 19-25]

20. Balance Sheets and Statements of profits and Loss and Earned Surplus, Pollock Paper Corp., by certified public accountants, for the following years: 1950, 1951, 1952, 1953, 1954, 1955 and 1956. [Exs. 26-32]

21. Financial statements for the Gummed Products Co. by certified public accountants, for the years 1950, 1951, 1952, 1953, 1954, 1955 and 1956. [Exs. 33-39]

22. Annual reports, Rhinelander Paper Co., for the following years: 1950, 1951, 1952, 1953, 1954 and 1955. [Exs. 40-45]

[fol. 100] 23. Consolidated Balance Sheets, Statement of consolidated earnings, statement of consolidated accumulated earnings, Rhinelander Paper Co. for 15 months ending Dec. 31, 1956. [Ex. 46]

24. Balance Sheets, and Statement of Income and Surplus, J. Neils Lumber Co., for the following years: 1950, 1951, 1952, 1953, 1954, 1955 and 1956. [Exs. 47-53]

25. Clothbound, looseleaf book relating to various types of multiwall bags produced by St. Regis Paper Co. [Ex. 54]

26. 21 exhibits comprising product samples of the various types of paper produced by St. Regis Paper Co. [Exs. 55-75]

27. 38 exhibits consisting of product samples and advertising or descriptive materials relating to paper products and other types of products manufactured by St. Regis Paper Co. [Exs. 76-112]

28. Address delivered by Folke Becker, Chairman of the Board of Rhinelander Paper Co., before the New York Society of Security Analysts, Oct. 3, 1955. [Ex. 113]

29. Brochures containing advertising material inserted in various publications in 1954, 1955, and 1956 by Rhinelander Paper Co.; catalogs of Rhinelander Paper Company products. [Exs. 114-118]

30. Brochures and advertising catalogs for The Gummed Products Company [Exs. 119-131]

[fol. 101] 31. Advertising publication, with pictures, concerning logging operations of J. Neils Lumber Co. [Ex. 132]

32. Printed advertising materials for the forest products of J. Neils Lumber Company. [Exs. 133-139]

33. Letter dated Oct. 11, 1957, from the president of Pollock Paper Corp. to Mr. H. F. Stevens of St. Regis Paper Co. The letter appears to be in response to a request by St. Regis for certain information which was to be passed along to the FTC. [Ex. 140]

34. Exhibit presenting expenditures for "Research & Development" and for "Advertising & Sales Promotion" for St. Regis Paper Co. in 1954, 1955 and 1956. Expenditures in each class are related to designated production divisions of St. Regis Paper Co. [Ex. 141]

35. Exhibit entitled "Specification Number 12—FTC Hearing" and shows the dollar value of sales by St. Regis to the following companies in 1956: Pacific Waxed Paper Co.; Pollock Paper Corp.; Gummed Products Co.; Rhinelander Paper Co.; J. Neils Lumber Co.; and St. Paul-Tacoma Lumber Co. [Ex. 142]

36. Exhibit showing sales of "waxing stock 18% and up" and "glassine and greaseproof" by Rhinelander Paper Co., and its subsidiaries to St. Regis Paper Co., and its subsidiaries in 1955 and 1956. [Ex. 143]

37. Exhibit showing total purchases of specific products from St. Regis and subsidiaries of Pollock Paper [fol. 102] Corp. in 1954 and in 1956; and sales by Pollock to St. Regis and its subsidiaries in 1954 and in 1956, by product. [Ex. 144]

38. Exhibit showing sales of particular products by The Gummed Products Co. to St. Regis and its subsidiaries in 1955 and in 1956. [Ex. 145]

39. Letter from J. M. Lamb to W. R. Adams, dated Sept. 27, 1955, evaluating certain timber properties, and requesting authorization to meet the highest bid for the property. [Ex. 146]

40. Agreement for the purchase by St. Regis of certain timberlands located in King County, Washington state, from the owner, Buffelen Mfg. Co. [Ex. 147]

41. Report dated Nov. 20, 1953, addressed to C. G. Armstrong & Co., Inc., signed by David T. Mason and Karl D. Hense. [Ex. 148]

42. Exhibit relating to timber acreage held by St. Regis in Washington state. [Ex. 149]

43. Exhibit analyzing the timber and land resources, in and around the areas where J. Neils Lumber Co. operated (Montana). Data is also presented as to the plant, properties, and policies of J. Neils Lumber Co. [Ex. 150]

44. Statement by the president of The Gummed Products Co. furnished "for the purpose of satisfying the requirements of the Committee on Stock List of the New York Stock Exhange" and containing information describing the product lines and operations of the subject company. [Ex. 151]

[fol. 103] 45. Letter agreement between St. Regis Paper Co., and Paul Neils, providing for the exchange of St. Regis common stock for common stock in J. Neils Lumber Company. [Ex. 152]

46. Agreement between St. Regis Paper Co. and various stockholders of the Pollock Paper Co., providing for the exchange of Pollock stock for St. Regis stock. An accountant's report with a balance sheet and certain other data as to Pollock's operations included. [Ex. 153]

47. Annual Reports of the St. Paul-Tacoma Lumber Co. for the following years: 1950, 1951, 1952, 1953, 1954, 1955. (Printed copies). [Exs. 154-159]

48. Annual Reports of the St. Paul-Tacoma Lumber Co. for the following years 1950, 1951, 1952, 1953, 1954, 1955. (Dittoed copies). [Exs. 160-166]

49. Product catalogs of the St. Paul and Tacoma Lumber Company. [Ex. 167]

50. A statement of amount and value of products sold to St. Regis by St. Paul-Tacoma Lumber Co. in 1956 and during the twelve months prior to acquisition. [Ex. 168]

51. A list of U. S. and Canadian patents owned by Rhinelander Paper Co., with patent numbers, names of inventors, dates of issuance, and expiration dates. [Ex. 169]

52. A letter from J. R. Fenneman, Treas., of Rhinelander Paper Co. to Homer Crawford, Secretary of St. Regis Paper Co., dated Oct. 23, 1957, transmitting a list of [fol. 104] patents owned by Rhinelander Paper Company. [Ex. 170]

53. A letter from the president of J. Neils Lumber Co. to Homer Crawford of St. Regis stating that J. Neils owned no patents nor was party to any patent licenses as of Oct. 25, 1957, the date of the letter. [Ex. 171]

54. Patent license covering patents relating to methods and machinery for manufacturing paper bags, executed between St. Regis as licensor and 18 separate licensees. List of names of 18 Licensees. [Exs. 172-173]

55. An offer dated March 30, 1957, from St. Regis to holders of common stock of Pacific Waxed Paper Co. offering to exchange St. Regis stock for Pacific Waxed Paper Stock. [Ex. 174]

56. A printed form to be used by stockholders of Pacific Waxed Paper Co. desiring to accept St. Regis' stock exchange offer, described in Paragraph 55. [Ex. 175]

57. A form letter dated April 18, 1956, from St. Regis to holders of stock in Pacific Waxed Paper Co., extending the period of time to accept the offer to exchange Pacific Waxed Paper stock for St. Regis stock. [Ex. 176]

58. A form letter dated May 17, 1956, extending the time period still further in which stockholders of Pacific Waxed Paper Co. could exchange their stock for St. Regis stock. [Ex. 177]

[fol. 105] 59. A form letter dated May 17, 1956, mailed to a few stockholders of Pacific Waxed Paper Co. who failed to receive previous offers by St. Regis to exchange stock. [Ex. 178]

60. An unexecuted copy of a contractual agreement between Weyerhaeuser Timber Co. and R-W Paper Co., providing for R-W to purchase chemical wood pulp from Weyerhaeuser. [Ex. 179]

61. An executed copy of an agreement between Rhinelander Paper Co. and Weyerhaeuser Timber Co., providing for establishment of a jointly owned glassine and greaseproof paper company on the West Coast. [Ex. 180]

62. Excerpts from the Executive Committee meeting of St. Regis Paper Co., dated September 21, 1956, authorizing the president of St. Regis to make an offer for the acquisition of J. Neils Lumber Co. [Ex. 181]

63. Excerpts from the Board of Directors meeting of St. Regis Paper Co. on Sept. 19, 1956. This excerpt is concerned with acquisition by St. Regis of J. Neils Lumber Company. [Ex. 182]

64. A list of patents owned by The Gummed Products Co., with description, date of issuance and number of each patent. [Ex. 183]

65. A list of the patents and trademarks owned by Pollock Paper Corp. Also a statement that Pacific Waxed Paper Co. had no patents. [Ex. 184]

[fol. 106] 66. An agreement whereby domestic and foreign patents relating to a particular adhesive invention were licensed by Gummed Products Co., the owner of these patents, to Lake State Yeast Corp. [Ex. 185]

67. Agreement whereby West Fork Timber Co. sold certain timberlands to St. Regis Paper Co., dated December 9, 1943. [Ex. 186]

68. A letter from the president of J. Neils Lumber Co. to his company's employees, informing them that J. Neils would merge with St. Regis. [Ex. 187]

69. Accountants' statements of the Balance Sheet and related statements of income and earned surplus of Pacific Waxed Paper Co. for each of the following years: 1950, 1951, 1952, 1953, 1954, 1955 and 1956. [Exs. 188-194]

70. Letter dated Nov. 4, 1957, from Maxwell R. Conklin, Chief, Industry Division, Bureau of the Census, replying to a request from J. H. Fenneman, Treasurer of Rhinelander Paper Company. [Ex. 195]

71. Letter dated June 12, 1956 from Maxwell R. Conklin, Chief of the Industry Div., Bureau of the Census, to Rhinelander Paper Co., discussing Census Schedules filed by Rhinelander. [Ex. 196]

72. Photocopy of Bureau of the Census Form MC-26A, PULP (Wood and Other Fiber), as completed and submitted to the Census Bureau by Rhinelander Paper Co., Pulp Mill. For 1954. [Ex. 197]

73. Photocopy of Bureau of the Census Form MC-26B, PRIMARY PAPER AND BOARD, as submitted to the Bureau [fol. 107] of the Census by Rhinelander Paper Co., Paper Division, for 1954. [Ex. 198]

74. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER AND BOARD PRODUCTS, as submitted to the Bureau by Rhinelander Paper Co., converting Division, 1954. [Ex. 199]

75. A memorandum dated Nov. 14, 1957, indicating purchases by Pacific Waxed Paper Co., from Rhinelander & Pollock Paper Co., during certain months in 1956. [Ex. 200]

76. Photocopy of letter dated Nov. 13, 1957, from Maxwell R. Conklin, Chief, Industry Div., Bureau of Census, to L. S. Pelling, Pres. of Pacific Waxed Paper Co., sending a photocopy to the company of its 1954 Census of Manufactures report on Form MC-26A. [Ex. 201]

77. Photocopy of Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau of Census by Pacific Waxed Paper Co., for 1954. [Ex. 202]

78. Photocopy of Bureau of the Census Form MC-26B, PRIMARY PAPER AND BOARD, as submitted to the Bureau by Pollock Paper Corp. for 1954. [Ex. 203]

79. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Ft. Worth Paper Co., for 1954. [Ex. 204]

80. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to [fol. 108] the Bureau by Mayflower Manufacturing Company, for 1954. [Ex. 205]

81. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Pollock Paper Corp., for 1954 [Ex. 206]

82. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Pollock Paper Corp., for 1954. [Ex. 207]

83. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Pollock Paper Corp., for 1954. [Ex. 208]

84. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Pollock Paper Corp., for 1954. [Ex. 209]

85. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Pollock Paper Corp., for 1954. [Ex. 210]

86. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Pollock Paper Corp., for 1954. [Ex. 211]

87. Photocopy of Bureau of the Census Form MC-26C, CONVERTED PAPER & BOARD PRODUCTS, as submitted to the Bureau by Pollock Paper Corp., for 1954. [Ex. 212]

[fol. 109] 88. A three-page typewritten statement by Homer Crawford as to why certain data as to the operations of R-W Paper Co. cannot be furnished to the Commission, and that in Mr. Crawford's opinion, all relevant information relating to Item 4 of the FTC *subpoena duces tecum* has been supplied to the Commission. [Ex. 213]

16. That Exhibits 18 to 29 annexed hereto are true copies of all correspondence and telegrams between St. Regis Paper Company, its counsel, its acquired companies and their counsel on the one hand, and the Commission and its staff on the other hand, between September 17, 1957, and June 30, 1958.

17. That the Commission, by letter dated June 30, 1958, signed by Mr. Stroud, requested counsel for St. Regis, who received the letter on July 1, 1958, to furnish the information and material described in a "Memorandum of Request for Information" attached to said letter. A copy of said letter and attachment is annexed hereto as Exhibit 30.

18. That on October 9, 1958, Mr. Stroud met with Mr. Lamb, Mr. Richard Wachtel, and Mr. Douglas Hawes, at the office of LeBoeuf, Lamb & Leiby in New York City. During said meeting Mr. Lamb inquired as to whether the Commission would accept, in lieu of the actual names and addresses of customers and suppliers, designations of such customers and suppliers by symbols, such as "Customer A", "Customer B", etc. Mr. Lamb said that the object of such a plan would be to furnish the information necessary [fol. 110] for the Commission's investigation without disclosing information which he considered to be confidential. Mr. Stroud advised Mr. Lamb that the names of customers and suppliers, which had been requested in his letter of June 30, 1958, were required in order to determine the probable effects of each acquisition through personal interviews with such customers and suppliers. Mr. Stroud advised Mr. Lamb that the Commission would not accept the information in this form and inquired of Mr. Lamb as to whether or not he would furnish the requested information. Mr. Lamb stated that St. Regis officials did not feel that they should be required to furnish this information to the

Commission. After further discussion, although Mr. Lamb stated he would again take up the matter of the Commission's request for this information with officials of St. Regis who were located in various parts of the country and would attempt in the next month or two to furnish all the information he could to Mr. Stroud, he asked that his request be referred to Mr. Stroud's Washington office. Mr. Lamb received the impression that this would be done. Mr. Stroud was of the opinion that he had answered the question by his previous statement that this would be unacceptable and that no further response was warranted at that time or thereafter.

19. That between June 30, 1958, and January 5, 1959, counsel for St. Regis voluntarily furnished the Commission with the following documents (dates in brackets indicate the date received by the Commission):

(a) Annual Report of St. Regis Paper Company for 1957 [July 10, 1958].

[fol. 111] (b) Prospectus of St. Regis Paper Co. dated August 7, 1958, relating to an issue of stock being offered in exchange for the stock of Growers Container Corporation [August 12, 1958].

20. That Exhibits 31 to 46 annexed hereto are true copies of all correspondence and telegrams between St. Regis Paper Company, its counsel, its acquired companies and their counsel on the one hand, and the Commission and its staff on the other hand, between July 1, 1958 and January 5, 1959.

21. That on January 6, 1959, the Commission adopted a resolution, a copy of which is annexed to the complaint herein as Exhibit A thereto, and on January 9, 1959, made orders, copies of which are annexed to the complaint herein as Exhibits B through G thereto.

22. That on June 4, 1959, the Commission adopted a resolution, a copy of which is annexed to the complaint herein as Exhibit I thereto, and on June 8, 1959, made orders, copies of which are annexed to the complaint as Exhibits J through L thereto.

23. That Exhibits 47 to 64 annexed hereto are true copies of all of St. Regis' motion papers, briefs and memoranda of law, and all Commission orders, Commission resolutions, Commission opinions and Commission notices of default (except Exhibits A through N to the complaint in this matter) relating to this matter filed or issued during the period January 6, 1959, to the date of this stipulation.

[fol. 112] 24. That Exhibits A through N to the complaint in this matter are true copies of Commission resolutions, Commission orders and Commission notices of default, and are incorporated herein and made a part hereof by this reference thereto.

25. That Exhibits 65 to 122 annexed hereto are true copies of all correspondence and telegrams between St. Regis Paper Company, its counsel, its acquired companies and their counsel, on the one hand, and the Commission and its staff on the other hand, between January 6, 1959, to the date of this stipulation.

26. That between January 6, 1959, and the date of this stipulation, counsel for St. Regis voluntarily furnished the Commission with the following documents (dates in brackets indicate the date received by the Commission):

(a) Prospectus of St. Regis Paper Co. dated December 30, 1958, relating to an issue of stock being offered in exchange for the stock of F. J. Kress Box Company [January 21, 1959].

(b) Agreement dated December 1, 1958, between shareholders of F. J. Kress Box Company and the St. Regis Paper Company [January 21, 1959].

(c) Agreement between St. Regis & H. E. Tenzler providing for exchange of St. Regis stock for all au-
[fol. 113] thorized stock of Northwest Door Co.; balance sheet of Northwest Door Co., dated September 30, 1958 (Exhibit "A"); letter dated November 25, 1958, from Carlson, Newlands & Rhea to St. Regis Paper Company [February 3, 1959].

(d) St. Regis Annual Report, 1958 [March 23, 1959].

(e) Prospectus of St. Regis Paper Company dated May 7, 1959, relating to an issue of stock being offered in exchange for the stock of Cupples-Hesse Corporation [June 19, 1959].

(f) Prospectus of St. Regis Paper Company dated October 14, 1959, relating to the acquisition of the stock of Cornell Paperboard Products Company [October 27, 1959].

27. That the Commission resolutions, Commission orders, Commission opinions and Commission notices of default referred to in paragraphs 21, 22, 23 and 24 of this stipulation were duly served on the corporations to whom they were directed or addressed, all of which were duly received by defendant or its counsel. The Notices of Default dated June 18, 1959, and July 22, 1959, annexed to the complaint as Exhibits M and N thereto, were served on St. Regis by registered mail on June 20, 1959 and July 24, 1959, respectively.

28. That the documents described in paragraphs 7, 9, 15, 19 and 26 hereof constitute all of the documents submitted to the Commission by St. Regis between September 7, 1956 and the date of this stipulation.

[fol. 114] 29. That the documents described in paragraphs 7, 9, 15, 19 and 26 hereof are in the possession of the Commission at Washington, D. C., and the fact of their submission and the contents thereof may be referred to in the briefs and in oral argument. These documents or true copies thereof will be furnished to the Court upon its request or direction.

30. Only those documents which are furnished to the Court pursuant to its request or direction and those documents which are offered by either party and admitted in evidence will be included in any record on appeal.

S. Hazard Gillespie, Jr., Attorney for Plaintiff.

LeBoeuf, Lamb & Leiby, Attorney for Defendant.

Dated: January 22, 1960.

[fol. 114a]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM EXHIBITS TO STIPULATION (DISTRICT COURT EXHIBIT 1A) SUBMITTED BY UNITED STATES ATTORNEY

[fol. 115]

EXHIBIT 1

FEDERAL TRADE COMMISSION

WASHINGTON 25

New York Branch Office:
U. S. Court House,
Foley Square
New York 7, N. Y.

September 7, 1956.

St. Regis Paper Company,
150 East 42nd Street,
New York, New York.

In re: Our File No. 5510696,
St. Regis Paper Company.

Gentlemen:

The above-captioned file has been forwarded to the New York Office of the Federal Trade Commission with instructions to investigate the acquisitions of the stock and/or assets of

(1) Rhinelander Paper Company;

(2) Pacific Waxed Paper Company;

(3) Pollock Paper Corporation;

(4) Growers Container Corporation;

(5) Chester Packaging Products Corporation;

(6) Superior Paper Products Company;

(7) General Container Corporation;

(8) Gummed Products Company;

(9) Ajax Box Company

by St. Regis Paper Company. This investigation is necessary to determine whether the said acquisitions, or any of them, may be in contravention of Section 7 of the Clayton Act, as amended.

It is therefore requested that you furnish this office with full and complete answers to each of the questions set out below and with copies of specified documentary material. If any question cannot be answered fully, furnish such information as is available to you and explain wherein and why your answer is incomplete.

[fol. 116]

1. a. Give the correct title, mailing address and the State and date of incorporation of St. Regis Paper Company.

   b. Give the correct corporate title of each company acquired by St. Regis Paper Company, and each company from which stock or assets were acquired since January 1, 1951 and state

      (i) the mailing address,

      (ii) the State and date of incorporation,

      (iii) the date on which the acquisition was consummated,

      (iv) the nature and location of each plant, factory, warehouse or timber tract acquired,

      (v) the present use or the disposition of the properties named in response to (iv), and

      (vi) a description of all patents acquired with a brief statement of the principal uses of each.

2. Submit copies of contracts, options, agreements and special reports or memoranda relating to each acquisition listed in response to item 1. b. above.

3. a. Submit copies of the annual reports of St. Regis Paper Company from 1950 to date, together with its most recent comprehensive registration statement, prospectus, solicitation of proxy statement, and statement listing its securities on any security exchange.

[fol. 117]

b. Submit the same information as that requested in item 3. a. above for the year prior to acquisition for each company whose stock or assets were acquired by St. Regis Paper Company since January 1, 1951.

4. Report the gross receipts of St. Regis Paper Company for the years 1950 and 1955, showing sources of receipts as specified on the attached Report Form A.

5. a. Identify and locate each establishment of St. Regis Paper Company producing

(i) liner board

(ii) corrugating material

(iii) container chip and filler board

(iv) folding boxboard

(v) set-up boxboard, and

(vi) all other paper board in 1950 and in 1955, and state which of the establishments listed for 1955 were acquired by St. Regis since January 1, 1951.

b. Identify and locate each establishment of St. Regis Paper Company producing

(i) corrugated sheets and single face,

(ii) corrugated boxes,

(iii) all other corrugated,

(iv) solid fiber sheets and blanks,

(v) solid fiber boxes, and

(vi) all other solid fiber in 1950 and 1955 and state which of the establishments listed for 1955 were acquired by St. Regis since January 1, 1951.

[fol. 118] Data requested in items 6, 8, 9 and 10 below should be submitted for each establishment of St. Regis Paper Company and for each establishment acquired by St. Regis since January 1, 1951. A recapitulation should also be provided, showing consolidated company data (a) for St. Regis Paper Company for each year (data for each acquired establishment should not be consolidated for the year of acquisition), and (b) for each company from which stock or assets were acquired for the year prior to acquisition and for the year of acquisition.

6. a. Report for each establishment of St. Regis Paper Company, and for each establishment of companies acquired by St. Regis for 1950, 1954 and 1955 production in tons of

(i) liner board,

(ii) corrugating material,

(iii) container chip and filler board,

(iv) folding boxboard,

(v) set-up boxboard,

(vi) special food board, and

(vii) all other paper board.

b. Report for each establishment of St. Regis Paper Company, and for each establishment of companies acquired by St. Regis, for 1950, 1954 and 1955, shipments (M. Sq. Ft.) of

(i) corrugated sheets and single face

(ii) corrugated boxes

(iii) all other corrugated,

(iv) solid fiber sheets and blanks,

(v) solid fiber boxes, and

(vi) all other solid fiber

[fol. 119]

7. a. Identify and locate each establishment of St. Regis Paper Company producing

(i) waxing stock (18 lb. and up),

(ii) glassine, greaseproof or vegetable parchment, and

(iii) polyethylene film

in 1950 and 1955, and state which of the establishments listed for 1955 were acquired by St. Regis since January 1, 1951.

b. Identify and locate each establishment of St. Regis Paper Company producing

(i) oiled, waxed or wax laminated paper,

(ii) polyethylene coated or laminated papers and

(iii) specialty bags and liners

in 1950 and 1955, and state which of the establishments listed for 1955 were acquired by St. Regis since January 1, 1951.

8. a. Report for each establishment of St. Regis Paper Company and for each establishment of companies acquired by St. Regis for each of the years 1947, 1950, 1954 and 1955, the primary paper and board data specified by Census product code number on the attached Report Form B.

[fol. 120]

b. Report for each establishment of St. Regis Paper Company and for each establishment of companies acquired by St. Regis, for each of the years 1947, 1950, 1954 and 1955, the quantity (tons) and dollar value of shipments of

(i) bleached glassine,

(ii) unbleached glassine,

(iii) bleached, greaseproof and manifold,

(iv) unbleached, greaseproof and manifold,

(v) baglass, and

(vi) ice cream bag paper

9. Report for each establishment of St. Regis Paper Company and for each establishment of companies acquired by St. Regis, for each of the years 1947, 1950, 1954 and 1955, the plastics material data specified by Census product code number on the attached Report Form C.

10. a. Report for each establishment of St. Regis Paper Company and each establishment of companies acquired by St. Regis, for each of the years 1947, 1950 and 1954, the converted paper and board data specified by Census product code number on the attached Report Form D-1.

b. Report for each establishment of St. Regis Paper Company and for each establishment of companies acquired by St. Regis, for 1955 the converted paper and board data specified by Census product code number on the attached Report Form D-2.

[fol. 121]

11. a. Report for 1955 St. Regis Paper Company brand names for

(i) waxing stock (18 lb. and up),

(ii) glassine, greaseproof or vegetable parchment,

(iii) polyethylene film,

(iv) oiled, waxed or wax laminated paper,

(v) polyethylene coated or laminated paper, and

(vi) specialty bags and liners

b. Submit the same information requested in item 11. a. above for the Rhinelander Paper Company.

c. Submit the same information requested in item 11. a. above for Pacific Waxed Paper Company.

12. Report for each of the years 1947, 1950, 1954 and 1955 expenditures for research and development made by St. Regis Paper Company for each of the products, or product lines, specified in item 11. a. above.

13. Report for each of the years 1947, 1950, 1954 and 1955, expenditures for advertising and sales promotion made by St. Regis Paper Company for each of the products, or product lines, specified in item 11. a. above.

14. a. Report for each of the products, or product lines, specified in item 11. a. above, the principal competitors of Rhinelander Paper Company in 1955.

[fol. 122]

b. Submit the same information requested in item 14. a. above for Pacific Waxed Paper Company.

15. Report for each of the products, or product lines, specified in item 11. a. above the dollar value of purchases made by St. Regis Paper Company from

(i) Rhinelander Paper Company,

(ii) Pacific Waxed Paper Company, and

(iii) all other suppliers in 1955.

For each of the products or product lines give the names and addresses of suppliers, other than Rhinelander Paper Company and Pacific Waxed Paper Company in 1955.

16. a. Describe briefly the methods of distribution used by Rhinelander Paper Company in 1955, showing what stages of distribution lay outside its control.

b. Submit the same information requested in item 16. a. above for Pacific Waxed Paper Company.

17. a. Submit a list showing the names and addresses of the customers of Rhinelander Paper Company in 1955, identifying jobber, converter and other customers separately and showing the dollar value of sales to each customer for that year.

b. Submit the same information requested in item 17. a. above for Pacific Waxed Paper Company.

[fol. 123]

c. Submit the same information requested in item 17. a. above for the customers of St. Regis Paper Company located in the States of California, Oregon and Washington, and purchasing

(i) waxing stock (18 lb. and up),

(ii) glassine, greaseproof or vegetable parchment,

(iii) polyethylene film,

(iv) oiled, waxed or wax laminated paper,

(v) polyethylene coated or laminated paper, and

(vi) specialty bags and liners (show customers of each product or product line separately)

18. a. What proportion of the product of Rhinelander Paper Company does St. Regis Paper Company expect to use in its own converted products? What proportion of Rhinelander Paper Company's output will be sold on the market?

b. Submit the same information requested in item 18. a. above for Pacific Waxed Paper Company.

19. a. Furnish a copy of the agreement between Rhinelander Paper Company and Weyerhauser Timber Co. covering the R-W Paper Company, and state the status of the agreement after the acquisition of Rhinelander Paper Company by St. Regis Paper Company.

[fol. 124]

b. State the capacity of the R-W Paper Company in terms of the products, or product lines, listed in Report Forms B, D-1 and D-2, the date when the mill will begin operation and the prospective channels of distribution for its products.

20. State the reasons for the acquisition of

a. Rhinelander Paper Company, and

b. Pacific Waxed Paper Company.

It is requested that the information and documentary material set out above be furnished to this office not later than October 15, 1956. It is understood that this request will not serve to limit the right of the Commission to require the submission of such further information as may be necessary for a determination of this matter.

Very truly yours,

/s/ Charles E. Stroud

Charles E. Stroud,
Attorney.

[fol. 125]

ATTACHMENT TO EXHIBIT 1

Report Form A

Source of Total Gross Receipts

Year .....

Source	Total gross receipts Dollars	Percent
A. List products produced, processed, or assembled by this company with its own facilities (include contract work done for others on their materials):		
(1)	$	%
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
(10)		
B. List products produced, processed, or assembled for this company by others (from materials owned by this company):		
(1)	$	%
(2)		
(3)		
(4)		
(5)		

Source	*Dollars*	*Percent*

C. List products bought and resold (without further processing or assembling by this company):

(1) ..... $..... %

(2) .....

(3) .....

(4) .....

(5) .....

D. List all other sources of income:

(1) ..... $..... %

(2) .....

(3) .....

(4) .....

(5) .....

Total gross receipts $..... 100%

[fol. 126]

ATTACHMENT TO EXHIBIT 1

Report Form B

Primary Paper and Board

Year .....

Is this an establishment report or a consolidated report (check one):

☐ Establishment report ☐ Consolidated report

If this is an establishment report, give location of establishment: .....

Was establishment owned by St. Regis in 1950 (check one):

☐ Yes ☐ No

If this is a consolidated report, give the name of the company for which data is consolidated:

.....

Product (a)	Production for all purposes (short tons) (b)	Shipments and Transfers: Total shipments and transfers — Short tons (c)	Total shipments and transfers — Value f.o.b. plant (omit cents) (d)	Transfers to other manufacturing establishments of your company — Short tons (e)	Transfers to other manufacturing establishments of your company — Value f.o.b. plant (omit cents) (f)	Market shipments (incl. exports) — Short tons (g)	Market shipments (incl. exports) — Value f.o.b. plant (omit cents) (h)	Census product code (i)
Unbleached kraft paper, containing more than 50% unbleached sulfate wood pulp								
Wrapping paper								
MF and MG wrapping paper (colored or natural)								26124 11
Butchers								26124 12
Misc., incl. screenings, core stock, bogus, mill wrappers, car liners and side rolls								26124 13
Bag paper								
Grocers and variety bag paper								26124 17
Other unbleached kraft bag paper								26124 19
Converting paper								
Waxing stock (18 lb. and up)								26124 28

Glassine, greaseproof and vegetable parchment	
Wrapping paper	26124 33
Bag stock	26124 35
Converting stock	26124 37
Other coarse paper, including bleached and semibleached kraft paper, sulfite and any mixed furnishes containing not more than 50% unbleached sulfate wood pulp	
Wrapping paper	
MF and MG wrapping paper (colored or natural)	26124 41
Butchers and grocers wrap	26124 43
Misc., incl. screenings, core stock, bogus, mill wrappers, car liners and side rolls	26124 45
Bag paper	
Grocers and variety bag paper	26124 53
Other bag paper	26124 55
Converting paper	
Waxing stock (18 lb. and up)	26124 66

Product	Production for all purposes (short tons)	Shipments and Transfers		Transfers to other manufacturing establishments of your company		Market shipments (incl. exports)		Census product code
		Total shipments and transfers						
		Short tons	Value f.o.b. plant (omit cents)	Short tons	Value f.o.b. plant (omit cents)	Short tons	Value f.o.b. plant (omit cents)	
(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)

[fol. 127]

Meaning of terms used in

Report Form B

Primary Paper and Board Products

Column (b)—"Production for all purposes"—the total amount of primary paper and board items produced, whether sold, transferred or added to inventory. Production should be reported on a finished basis, that is machine production less machine and finishing room waste.

Columns (c) and (d)—"Total shipments and transfers" —the quantity and selling value, f.o.b. plant, of the specified primary paper and board items shipped or transferred by your company during each of the years for which information is requested. It should include primary paper and board items transferred to converting establishments or departments of your company, as well as products shipped to your customers. It should include products shipped on consignment, whether or not sold at the end of the year. It should also include items shipped to central warehouses and sales branches of your company, with deductions for stock returned.

The net selling value, f.o.b. plant, of your company's total shipments of each item listed should be reported. The reported figures should represent values f.o.b. plant after discounts and allowances and should not include freight charges or excise taxes.

Columns (e) and (f)—"Transfers to other manufacturing establishments of your company"—the quantity and value of the specified primary paper and board items trans-
[fol. 128] ferred or shipped to other manufacturing establishments of your company.

Reported figures should not include data for other intra-company transfers to warehouses or sales branches. Such transfers should be reported as "market shipments."

For value of the specified primary paper and board items transferred to other manufacturing establishments (converting departments) of your company at the same site as that at which the stock was manufactured or at any other locations, report on estimated value based upon market

value minus cost of services not performed, such as transportation, wrapping, etc.; or if representative market values are not available, upon "costs." If "costs" are used, the value should cover the cost of wood pulp, waste paper, chemicals, other paper mill supplies, fuel, electrical energy, and direct labor applicable to the primary paper and board operations, together with a reasonable proportion of the total indirect labor costs, overhead costs, and company profits or loss reasonably assignable to the mill stage of operation.

Columns (g) and (h)—"Market shipments (including exports)"—the quantity and selling value, f.o.b. plant, of all specified primary paper and board items which were shipped during each of the years for which information is requested to companies not owned, operated, or affiliated with your company.

Outgoing freight should not be included even though such freight is customarily included in your price quotations and invoices.

[fol. 129]

ATTACHMENT TO EXHIBIT 1

Report Form C

Plastics Materials

Year .....

Is this an establishment report or a consolidated report (check one):

☐ Establishment report ☐ Consolidated report

If this is an establishment report, give location of establishment:

.....

Was establishment owned by St. Regis in 1950 (check one):

☐ Yes ☐ No

If this is a consolidated report, give the name of the company for which data is consolidated: .....

Product (a)	Unit of Measure (b)	Production for all purposes, including further manufacture (quantity) (c)	Total shipments and transfers		Census product code (f)
			Quantity (d)	Value f.o.b. plant (omit cents) (e)	
Polyethylene sheeting and film					
Under 3.0 mils	M pounds				28234 51
3.0- 5.9 mils	M pounds				28234 53
6.0-14.9 mils	M pounds				28234 55
Over 15.0 mils	M pounds				28234 57

[fol. 130]

ATTACHMENT TO EXHIBIT 1

Report Form D-1

Converted Paper and Board Products

Year .....

Is this an establishment report or a consolidated report (check one):

☐ Establishment report ☐ Consolidated report

If this is an establishment report, give location of establishment:

.....

Was establishment owned by St. Regis in 1950 (check one):

☐ Yes ☐ No

If this is a consolidated report, give the name of the company for which data is consolidated: .....

Product (a)	Total shipments and transfers: Value f.o.b. plant (omit cents) (b)	Consumption of paper and board: Produced by this company (short tons) (c)	Consumption of paper and board: Purchased by this company (short tons) (d)	Census Product code (e)
Oiled, waxed and wax laminated paper				
Oiled and similarly treated paper				26412 11
Waxed and wax laminated paper				
Printed bread wraps				26412 21
Unprinted bread wraps				26412 25
Household waxed paper				26412 31
Delicatessen paper				26412 41
Locker papers				26412 51
Cereal and similar wraps				26412 61
Other (specify kind)				26412 71

Product (a)	Total shipments and transfers: Value f.o.b. plant (omit cents) (b)	Consumption of paper and board: Produced by this company (short tons) (c)	Consumption of paper and board: Purchased by this company (short tons) (d)	Product Census code (e)
Grocers and variety bags, paper				26611 11
Specialty bags and liners				
Paper, excluding glassine, greaseproof and waxed paper				26612 11
Glassine, greaseproof and waxed paper				26612 31
Foil or foil backed paper				26612 51
Cellophane				26612 61
Polyethylene				26612 71
Other sheet materials (pliofilm, acetate, and other plastics—specify kind)				26612 98

[fol. 131]

Meaning of terms used in

Report Form D-1

Converted Paper and Board Products

Column (b)—"Total shipments and transfers"—the value of the specified converted paper and board products shipped by your company during each of the years for which information is requested. Figures may be based on records of sales, shipments, or billings, whichever most closely approximate the physical movements of products out of the plant.

If production records are used, please adjust the production figures to reflect finished goods inventory changes. Include goods shipped or consigned, whether or not sold at the end of the year. Include products shipped to the manufacturing plants, central warehouses, and sales branches of your company. Deduct products returned.

For value of shipments, report the net selling value at the factory or plant of the total quantity of each product listed. This value should approximate as nearly as possible the actual amounts received or receivable by you for shipments during the year. The reported figures should represent values f.o.b. plant after discounts and allowances, and should not include freight charges and excise taxes.

Columns (c) and (d)—"Consumption of paper and board"—the quantity of paper and board consumed in fabricating the listed converted products.

It should include the quantity of paper or board consumed by your company in the manufacture of containers, cores, boxes, wrapping, etc., used to package and ship the converted product. It should not include the quantity of [fol. 132] paper or board in purchased containers.

In reporting on consumption of paper and board produced by your company, include the quantity of paper or board consumed which was made in a paper mill of your company at the same site as the converting establishment and at any other location.

In reporting on consumption of paper or board purchased by your company, report the quantity purchased from all sources other than plants owned or controlled by your company and consumed in the manufacture of each specified product during each of the years for which information is requested.

[fol. 133]

ATTACHMENT TO EXHIBIT 1

Report Form D-2

Converted Paper and Board Products

1955

Is this an establishment report or a consolidated report (check one):

☐ Establishment report ☐ Consolidated report

If this is an establishment report, give location of establishment:

.....

Was establishment owned by St. Regis in 1950 (check one):

☐ Yes ☐ No

If this is a consolidated report, give the name of the company for which data is consolidated: .....

Product	Total value of shipments, including interplant transfers f.o.b. plant (omit cents)
Commercial packing, total	
Bags, pouches, envelopes, drum liners, blankets, and tubes; plain or printed, waxed or unwaxed, total	
Cellophane (unsupported)	
Polyethylene (unsupported)	
Polyethylene in combination with paper, film, and foil or with foil combinations	
Kraft or sulfite paper, single or in combination with other paper; kraft, sulfite, or greaseproof paper in combination with plastic films other than polyethylene; and unsupported films other than cellophane and polyethylene	
Glassine, greaseproof, and parchment, laminated or unlaminated, including waxed or unwaxed, plain or preprinted wax paper	

Product	Total value of shipments, including interplant transfers f.o.b. plant (omit cents)
Printed rolls and printed sheets, except laminated or coated structures, total	
Cellophane	
Paper, all types	
All other materials, including foil	
Laminated or coated rolls and sheets, plain or printed (excluding unprinted paper mounted foils for cigarettes and chewing gum wraps, and bottle, can, and cannister labels)	

[fol. 134]

EXHIBIT 13

F.T.C. 70

SUBPOENA DUCES TECUM

UNITED STATES OF AMERICA

FEDERAL TRADE COMMISSION

[Stamp—Entered—SEP 16 1957—LeBoeuf, Lamb & Leiby By *AJP*.]

To Homer Crawford, Secretary,
St. Regis Paper Company,
150 East 42nd St., New York, N. Y.

You are hereby required to appear before Albert G. Seidman or Charles E. Stroud, attorneys of the Federal Trade Commission, at Room 2904, United States Courthouse, Foley Square, in the City of New York, State of New York, on the 27th day of September, 1957, at 10:00 o'clock a.m. of that day, to testify .....

And you are hereby required to bring with you and produce at said time and place the following books, papers,

and documents: As per attached Specifications which are made a part hereof: Provided, however, that this subpoena duces tecum is returnable before Albert G. Seidman or Charles E. Stroud on the 27th day of September, 1957, at 10:00 a.m. of that day at the principal office of St. Regis Paper Company, 150 East 42nd St., New York, New York, at the election of St. Regis Paper Company upon notice of this election being given to the Federal Trade Commission not later than the 22nd day of September, 1957.

Fail not at your peril.

In testimony whereof, the undersigned, a member of the Federal Trade Commission, has hereunto set his hand and caused the seal of said Federal Trade Commission to be affixed at Washington, D. C., this 13th day of September, 1957.

/s/ SIGURD ANDERSON
Commissioner

Served on Homer Crawford as Secretary of St. Regis Paper Company by Charles E. Stroud on Monday September 16, 1957.

Homer Crawford

NOTICE TO WITNESS.—If claim is made for witness fee or mileage this subpoena should accompany voucher.

Italicized material denotes handwritten notation.

[fol. 135]

SPECIFICATIONS

1. All paper writings, written or received since January 1, 1955, which refer or relate to the desirability, necessity or other reasons bearing on the decision of St. Regis Paper Company to acquire the securities or assets of Pacific Waxed Paper Co., Pollock Paper Corp., Gummed Products Co., Rhinelander Paper Company, J. Neils Lumber Company, and St. Paul & Tacoma Lumber Company.

2. All paper writings, options, agreements, relating to the acquisition by St. Regis Paper Company of the securities or assets of the concerns named in Specification 1.

3. All paper writings, written or received since January 1, 1955, which refer or relate to the properties, plants, patents, timber and timber lands, securities, management, products, distribution system, and business of the concerns named in Specification 1.

4. All paper writings, written or received since January 1, 1955, which refer or relate to the properties, plants, lands, patents, securities, timber or timber lands, products, management, distribution system of R-W Paper Co.

5. Annual Reports of St. Regis Paper Company and the other concerns named in Specification 1, for the years 1950 through 1956, inclusive.

6. All letters patent issued or assigned to the St. Regis Paper Company and the other concerns named in Specification 1.

7. All current patent license agreements in which St. Regis Paper Company, or the concerns named in Specification 1 are designated either as licensors or licensees.

8. The most recent comprehensive registration statement prospectus, solicitation or proxy statement, and statement listing securities on any exchange which refer or relate to the securities of St. Regis Paper Company and other concerns named in Specification 1.

9. Catalogues and other paper writings for the years 1954, 1955 and 1956 which list, illustrate or describe the products of St. Regis Paper Company and the products of the other concerns named in Specification 1.

[fol. 136] 10. All paper writings, records, books of account, which show the expenditures made by St. Regis Paper Company in the years 1954, 1955 and 1956 for research and development, and advertising and sales promotion, for each paper product line.

11. All paper writings, records and books of account showing the amount and value of sales and interplant transfers, by product, made by the concerns named in Specification 1 to St. Regis Paper Company during the year immediately preceding the acquisition of the securities or assets of these concerns, and during the year 1956.

12. All paper writings, records and books of account showing the amount and value of sales and interplant transfers, by product, made by St. Regis Paper Company to the concerns named in Specification 1, for the year immediately preceding the acquisition of the securities and assets of said concerns, and during the year 1956.

13. Duplicate copies of the complete reports submitted to the Bureau of the Census for the 1954 Census of Manufacturers, Forms MC 26A, MC 26B, and MC 26C by the following concerns:

Pollock Paper Corp.
Gummed Products Co.
Pacific Waxed Paper Co.
J. Neils Lumber Company, and
St. Paul & Tacoma Lumber Company.

14. All paper writings, written or received, which relate to the reports submitted to the Bureau of the Census for the 1954 Census of Manufacturers by St. Regis Paper Company and the other concerns named in Specification 13.

15. All paper writings, books, records and reports which show, as of January 1, 1956, the area and acres of land (all classes) owned or leased by St. Regis Paper Company, J. Neils Lumber Company, and St. Paul & Tacoma Lumber Company, located in the States of Washington, Oregon, California, Montana, Territory of Alaska; the area and acres of commercial forest land owned or leased by said companies in the aforesaid States; and the net volume of live saw timber in board feet on commercial forest land owned or leased by said companies and located in the aforesaid States, for the following specie:
[fol. 137]

Ponderosa Pine
Lodge Pole Pine
True Firs
Spruce
Cedar
Hemlock
Sitka Spruce.

The corporate name, St. Regis Paper Company, as used herein, identifies St. Regis Paper Company and all subsidiary corporations under the ownership and control of St. Regis Paper Company.

[fol. 138]

RETURN OF SERVICE

I hereby certify that a duplicate original of the within supoena was

duly served (Indicate by check √ method used.)

- in person. √
- by registered mail.
- by leaving copy at principal office or place of business, to wit:

.....

.....

.....

on the person named herein on September 16, 1957.
(Month, day, and year)

/s/ CHARLES E. STROUD
(Name of person making service)
Attorney
(Official title)

I certify that the person named herein was in attendance as a witness at .....

.....

on .....
(Month, day or days, and year)

.....
(Name of person certifying)

.....
(Official title)

[fol. 139]

EXHIBIT 30

FEDERAL TRADE COMMISSION

WASHINGTON 25

New York Branch Office:
U. S. Court House,
Foley Square,
New York 7, N. Y.

June 30, 1958.

Horace R. Lamb, Esquire,
LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York

In re: File No. 5510696
St. Regis Paper Company.

Dear Mr. Lamb:

In order that the Commission may complete the investigation of the above captioned matter, relating to the acquisition of the stock or assets of various corporations, it is requested that St. Regis Paper Company furnish as promptly as possible the information and materials set out in detail on the attached memoranda of request for information.

In the event you or any of the officials of your client wish to discuss the type and volume of information requested, I will be glad to meet with you for that purpose at your convenience.

Very truly yours,

/s/ CHARLES E. STROUD
Charles E. Stroud,
Attorney.

Encs.

[fol. 140]

ATTACHMENT TO EXHIBIT 30

MEMORANDUM OF REQUEST FOR INFORMATION ST. REGIS PAPER COMPANY

1. Furnish copy of the 1957 annual report.

2. Furnish the dollar volume of transfers or sales of primary paper made by St. Regis to the converting plants of:

a. Superior Paper Products Company.
b. Pollock Paper Corporation.
c. General Container Corporation.
d. Ajax Box Company.
e. Cambridge Corrugated Box Company.
f. Gummed Products Company.
g. Pacific Waxed Paper Company.
h. Rhinelander Paper Company.

for the calendar years of 1956 and 1957.

3. Furnish a statement showing the production in tons of gummed sealing tape, gummed reinforced box tape and flat gummed paper by the East Pepperell, Massachusetts plant for the years 1955, 1956 and 1957.

4. Furnish the names and addresses of the 10 largest customers for gummed sealing tape, gummed reinforced box tape and flat gummed paper and the dollar volume of sales to each for the years 1955, 1956 and 1957.

5. Furnish a statement of the dollar volume of sales of paper board, liner board, corrugating material and gummed reinforced box tape to Growers Container Corporation for the years 1955, 1956 and 1957.

6(a).

What plans, if any, has St. Regis for the acquisition of further common stockholdings in Growers Container Corporation?

6(b).

Have St. Regis negotiations for the purchase of the Jacksonville, Florida plant of Growers Container Corporation been abandoned? If not, what is the current status of such negotiations?

[fol. 141]

MEMORANDUM OF REQUEST FOR INFORMATION SUPERIOR PAPER PRODUCTS COMPANY

1. Furnish the names and addresses of suppliers of paper board, liner board, corrugating material and gummed reinforced box tape with the dollar volume of purchases of each product from each supplier for the calendar years 1953 and 1957.

2. Furnish the names and addresses of the 10 largest customers and the dollar volume of sales to each for the calendar years 1953 and 1957.

3. Describe the principal market area for Superior for the years 1953 and 1957.

4. Furnish copies of all reports of production, shipments, orders received and orders unfilled, made by Superior to trade associations in the years 1953 through 1957.

5. Describe any changes which have been made in the character and scope of Superior's operations since April 1954.

6. If Superior's plants or production equipment have been enlarged or new plants built since April 1954, furnish details of such changes.

[fol. 142]

MEMORANDUM OF REQUEST FOR INFORMATION POLLOCK PAPER CORPORATION

1. Furnish the names and addresses of all suppliers of waxing stock, paper board, liner board, corrugating material, gummed reinforced box tape and cellophane, together

with the volume of purchases of each product from each supplier for the calendar years 1954, 1956 and 1957.

2. Furnish the names and addresses of Pollock's 10 largest customers for:

a. Waxed bread wraps.
b. Folding cartons.
c. Set-up paper boxes.
d. Corrugated shipping containers.
e. Cellophane bread wraps.

for the years 1954 and 1957, together with the dollar volume of sales to each customer for both years.

3. Describe the extent to which cellophane is used as a substitute for waxed paper in the manufacture of bread wraps.

4. Describe Pollock's principal marketing areas for each of its products as they existed in 1954 and in 1957.

5. Furnish copies of all reports of production, shipments, orders received and orders unfilled made by Pollock to trade associations in the period from January 1, 1954 through December 31, 1957.

6. Describe any changes which have been made in the character and scope of Pollock's operations since June 1955?

7. If Pollock's plants and production equipment have been increased or new plants built since June 1955, furnish details of such changes.

[fol. 143] 8. Furnish copies of all Census Schedules submitted to the Bureau of Census covering Pollock's wholesale operations for the years 1954 and 1956.

[fol. 144]

MEMORANDUM OF REQUEST FOR INFORMATION

GENERAL CONTAINER CORPORATION

(FOR EACH OF GENERAL'S 4 DIVISIONS AND 5 OPERATING SUBSIDIARIES)

1. Furnish the names and addresses of suppliers of paper board, liner board, corrugating material and gummed rein-

forced box tape with the dollar volume of purchases of each product from each supplier for the calendar years 1954 and 1957.

2. Furnish the names and addresses of the 10 largest customers with the dollar volume of sales to each for the calendar years 1954 and 1957.

3. Describe the principal marketing areas as they existed in 1954 and in 1957.

4. Furnish copies of all reports on production, shipments, orders received and orders unfilled made to trade associations for the period from January 1, 1954 through December 31, 1957.

5. Describe any changes which have been made in the character and scope of operations since September 1955?

6. If plants and equipment have been enlarged or new plants built since September 1955, describe the changes which have been made.

[fol. 145]

MEMORANDUM OF REQUEST FOR INFORMATION

AJAX BOX COMPANY

1. Furnish the names and addresses of suppliers of paper board, liner board, corrugating material, gummed reinforced box tape and other types of primary paper with the dollar volume of purchases of each product from each supplier for the calendar years 1955 and 1957.

2. Furnish the names and addresses of the 10 largest customers and the dollar volume of sales to each for the calendar years 1955 and 1957.

3. Describe the principal marketing area as it existed in 1955 and in 1957.

4. Furnish copies of all reports on production, shipments, orders received, and orders unfilled made to trade associations in the period from January 1, 1955 through December 31, 1957.

5. Describe any changes which have been made in the character and scope of operations since January 1956.

6. If plants and equipment have been enlarged or new plants built since January 1956, furnish details on such changes.

[fol. 146]

MEMORANDUM OF REQUEST FOR INFORMATION

CAMBRIDGE CORRUGATED BOX COMPANY

1. Furnish the names and addresses of suppliers of corrugating sheets, paper board, gummed reinforced box tape and other type of primary paper with the dollar volume of purchases of each product from each supplier for the calendar years of 1956 and 1957.

2. Furnish the names and addresses of the 10 largest customers and the volume of sales to each for the calendar years 1956 and 1957.

3. Describe the principal marketing area as it existed in 1956 and 1957.

4. Furnish copies of all reports on production, shipments, orders received and orders unfilled made to trade associations in the period from January 1, 1955 through December 31, 1957.

5. Describe any changes which have been made in the character and scope of operations since September 1956.

6. If plants and equipment have been enlarged or new plants built since September 1956, describe the changes made.

[fol. 147]

MEMORANDUM OF REQUEST FOR INFORMATION

GUMMED PRODUCTS COMPANY

1. Furnish the names and addresses of suppliers of gumming stock and other primary papers with the dollar volume of purchases of each product from each supplier for the calendar years 1955 and 1957.

2. Furnish the names and addresses of the 10 largest customers for:

a. Gummed kraft sealing tape.
b. Gummed reinforced box tape.
c. Flat gummed printing papers and

the dollar volume of sales to each for the calendar years 1955 and 1957.

3. Describe the principal marketing area and the method of distribution for the years 1955 and 1957.

4. Furnish copies of all reports on production, shipments, orders received and orders unfilled made to trade associations in the period from January 1, 1955 through December 31, 1957.

5. Describe any changes which have been made in the character and scope of company operations since January 1956.

6. If plants and equipment have been enlarged or new plants constructed since January 1956, furnish details of such changes.

[fol. 148]

MEMORANDUM OF REQUEST FOR INFORMATION

PACIFIC WAXED PAPER COMPANY

1. Furnish the names and suppliers of waxing stock, waxed paper and other primary papers with the dollar volume of purchases of each product from each supplier for the calendar years 1955 and 1957.

2. Furnish the names and addresses of the 10 largest customers and the dollar volume of sales to each for the calendar years 1955 and 1957.

3. Describe the principal marketing area and method of sale and distribution for the years 1955 and 1957.

4. Furnish copies of all reports on production, shipment, orders received and orders unfilled made to trade associations in the period from January 1, 1955 through December 31, 1957.

5. Describe any changes which have been made in the character and scope of company operations since April 1956.

6. If plants or equipment have been enlarged or new plants constructed since April 1956, furnish details.

[fol. 149]

MEMORANDUM OF REQUEST FOR INFORMATION

RHINELANDER PAPER COMPANY

1. Furnish the names and addresses of the 20 largest customers and the dollar volume of sales to each for the calendar years 1955 and 1957.

2. Describe Rhinelander's principal marketing areas and method of distribution for the years 1955 and 1957.

3. Furnish copies of all reports on production, shipments, orders received and orders unfilled made to trade associations in the period from January 1, 1955 to December 31, 1957.

4. Furnish copies of all reports received from officials or employees of R-W Paper Company concerning:

a. Production
b. Sales
c. Shipments
d. Profit and/or loss from operations.
e. The establishment of R-W Paper Company's sales force.
f. Former Pacific Coast customers of Rhinelander Paper Company now being supplied by R-W Paper Company in the period from July 1956 to June 1, 1958.

5. Describe any changes which have been made in the character and scope of company operations since May 1956.

6. If plants and equipment have been enlarged or new plants constructed since May 1956, give details of such changes.

7. Furnish copies of all correspondence relating to amendments or explanations of schedules submitted to the Bureau of the Census for the 1954 census of manufactures.

[fol. 150]

MEMORANDUM OF REQUEST FOR INFORMATION

J. NEILS LUMBER COMPANY

1. Furnish a list of plants, their location, their principal product lines and their rated capacities for each product line.

2. Furnish a copy of the schedules submitted to the Bureau of the Census for the 1954 Census of Manufactures.

3. Furnish the names and addresses of the 20 largest customers and the dollar volume of sales to each for the calendar years 1956 and 1957.

4. Furnish complete details of all sales or transfers of products to St. Regis, its divisions or its subsidiaries in the calendar years 1956 and 1957.

5. Describe the method of distribution of company products for the years 1956 and 1957 and note any changes made in such methods since January 1957.

6. Furnish the following information concerning commercial forest lands owned or controlled (under lease or cutting rights) by Neils as of January 1, 1957:

a. Location and acreage by County and State.
b. Location in relation to commercial forest lands owned or controlled by St. Regis and St. Paul and Tacoma Lumber Company.
c. Net volume of live saw timber on such commercial forest lands in board feet distributed by State for:

Douglas Fir
Ponderosa Pine
Hemlock
Lodge Pole Pine
Spruce
Other species

[fol. 151] 7. Furnish copies of all reports on production, shipments, orders received and orders unfilled made to trade

associations in the period from January 1, 1955 to December 31, 1957.

8. Furnish complete details on the production and sale of pulp wood, chips or sawmill waste to pulp or paper mills for the years 1956 and 1957.

[fol. 152]

MEMORANDUM OF REQUEST FOR INFORMATION

ST. PAUL & TACOMA LUMBER COMPANY

1. Furnish a list of plants, their locations, their product lines and rated capacities for each product line.

2. Furnish a copy of the schedules submitted to the Bureau of Census for the 1954 Census of Manufactures.

3. Furnish the names of the 20 largest customers and the dollar volume of sales to each for the calendar years 1956 and 1957.

4. Furnish complete details of all sales or transfers of products to St. Regis, its divisions or subsidiaries in the calendar year of 1957.

5. Describe the method of distribution of company products for 1956 and 1957 and note any changes made in such method since June 1957.

6. Furnish the following information concerning commercial forest lands owned or controlled (under lease or cutting rights) by the company as of June 1, 1957:

a. Location and acreage by County and State.
b. Location in relation to commercial forest lands owned or controlled by St. Regis and J. Neils Lumber Company.
c. The net volume of live saw timber in board feet distributed by State for:

Douglas Fir
Hemlock
Spruce
Other species.

7. Furnish copies of all reports on production, shipments, orders received and orders unfilled made to trade associ-

ations in the period from January 1, 1955 to December 31, 1957.

[fol. 153]

EXHIBIT 31

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN C. LEIBY
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JOHN A. BROUGH
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JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N.W.
WASHINGTON 6, D. C.

July 10, 1958

Charles E. Stroud, Esq., Attorney
Federal Trade Commission
New York Branch Office
New York Court House
Foley Square
New York 7, New York

Re: St. Regis Paper Company
Your File No. 5510696

Dear Mr. Stroud:

Your letter dated June 30, 1958 and the "Memorandum of Request for Information" which accompanies such letter have been received.

In the press of other work there has been no opportunity to examine in detail the 13 typewritten pages of the Memorandum and the 70+ separate items of additional information requested therein; and due to absences on vacation we have been unable to discuss this matter with our client to appraise the enormous amount of information that would be required, and there will be no opportunity to do so, especially at this season of the year.

In any event, from the examination made thus far, it is apparent that an enormous amount of additional information has been requested relating to the acquisition by our client of the stocks or assets of not only the 8 corporations named on page 1 of the Memorandum but also the 2 additional corporations named on pages 12 and 13. It is exceedingly difficult to estimate the time and effort of our client's busy employees that would be required to develop such information, but there is little doubt that it may require several weeks for completion.

From reading your letter one not familiar with this subject might receive the impression that our client had not previously furnished a considerable amount of information regarding the acquisition of the eight corporations listed page 1 of the Memorandum. They are:

[fol. 154] Superior Paper Products Company
Pollock Paper Corporation
General Container Corporation
Ajax Box Company
Cambridge Corrugated Box Company
Gummed Products Company
Pacific Waxed Paper Company
Rhinelander Paper Company

It is my present recollection that since receipt by our client of the Commission's ten page letter dated September 7, 1956 and the Commission's subpoena dated September 13, 1957 (returnable before you and Mr. Seidman), our client furnished all of the information previously requested by the Commission regarding these acquisitions. I note, in this connection, that the final page of the reporter's transcript of the stenographic minutes of the so-called hearing

at your office on December 13, 1957, clearly indicates that all of the papers, documents and records requested, which were within the control of our client, had been furnished, except census reports which thereafter were furnished, and the reporter noted on the transcript:

> "(Whereupon, at 12:05 p.m., December 13, 1957, the hearing in the above entitled matter was concluded.)"

The acquisitions by our client of the stocks of the above-named eight corporations were all completed during the period beginning approximately September 15, 1954 and ending April 19, 1956. Thus, the request now made for additional information on those acquisitions relates to transactions which were concluded, in some cases, as long as nearly 4 years ago, and, at the latest, more than 2 years ago. In that period the business and properties of all such eight corporations have been fully integrated into our client's total business and properties.

In the circumstances, it is difficult to see why there is any necessity for the furnishing of any additional information regarding the eight acquisitions mentioned, particularly for the years subsequent to the completion of the acquisitions.

[fol. 155] Your letter states on page 1 that the purpose of the information is in order that the Commission may "complete" the investigation of the above captioned matter. So far as the eight corporations named above are concerned, it would appear that the Commission has had adequate information on which it may determine that none of said acquisitions involved any substantial lessening of competition within the meaning of Section 7 of the Clayton Act, as construed by numerous decisions of the courts.

Furthermore, I fail to understand how the Commission's investigation of such acquisitions could be aided in any respect by any transactions occurring in the years 1956 and 1957, long after said acquisitions, especially where, as here, and as indicated above, subsequent to the completion of the acquisitions such substantial changes, additions and modifications have been made in respect of the various plants

and properties and the businesses of the corporations whose stocks were previously acquired by our client.

Turning now to the portion of the Memorandum enclosed with your letter, which requests information regarding J. Neils Lumber Company and St. Paul and Tacoma Lumber Company, it is my recollection that in November, 1956 and in June of 1957, at the times our client made its offers to the shareholders of these two companies for the exchange of their shares for shares of the common stock of our client, you were informed of the fact that such offers were being made and that copies of our client's registration statement, as filed with the Securities and Exchange Commission, relating to each of those matters, were furnished to the Commission. It is my further recollection that after examining such registration statements it was indicated that no further information relating to those exchanges would be required. The exchange of the shares of the J. Neils Lumber Company was concluded early in January, 1957, and the exchange of the shares of St. Paul and Tacoma Lumber Company was concluded in August of 1957.

The registration statements relating to those transactions would provide adequate information from which the Commission could readily conclude that: (1) prior to those transactions our client was not engaged in the production or sale of lumber products, (2) neither of the two lumber companies mentioned were in competition with each other because of the different types of lumber manufactured and of the different locations of their manufacturing [fol. 156] plants, and (3) both of those transactions were "combinations" of corporations effected by "pooling of interests", within the meaning of those terms as construed by the accounting staff of the Securities and Exchange Commission.

It may also be added that in accordance with the statement of our client's intention, as expressly set out in the registration statements, subsequent to the completion of the exchange of shares of the two lumber companies, both of the companies have been merged into St. Regis Paper Company and their respective assets and businesses are

presently owned and operated as an integral part of the total business and properties of our client.

It is also noted that at the bottom of page 1 of the Memorandum which accompanied your letter inquiries are made as to our client's plans for the acquisition of further shares (in addition to the 1,000,000 shares held by our client since January 1956) of the capital stock of Growers Container Corporation, and whether the negotiations for the purchase by our client of the Jacksonville, Florida, plant of Growers has been abandoned and if not, what is the current status of such negotiations.

In response to those inquiries, I can now inform you that the proposed purchase of the Jacksonville, Florida, plant was not concluded and that our client has authorized the making of an offer to all holders of outstanding shares of the capital stock of Growers (other than our client) for the exchange of their shares for shares of the authorized but unissued common stock of our client, such offer to be made under a prospectus forming a part of a registration statement which has recently been filed with the Securities and Exchange Commission. If you desire, we shall be pleased to furnish you a copy of this registration statement, as and when it becomes effective, which, it is expected, will occur the latter part of this month or early in August. This registration statement contains adequate information to establish that there is no competition between Growers and our client because our client has no container mills on the Pacific coast or in Florida (Growers owns and operates container manufacturing plants at Salinas and Fullerton, California, as well as at Eastport near Jacksonville, Florida) and this proposed acquisition of additional shares of Growers by our client would not present any question under Section 7 of the Clayton Act.

[fol. 157] It is further noted that item 1 on page 1 of the Memorandum requests a copy of our client's 1957 annual report. Herewith I am pleased to enclose a copy of such report issued under date of February 11, 1958 and mailed to all registered holders of our client's stock during March 1958.

It seems to me that the foregoing adequately deals with the matters mentioned in your letter and the accompanying Memorandum. In the circumstances, therefore, I see no necessity for any further discussion with you regarding the type and volume of information requested. However, if you desire to have a meeting I suggest that you let me know, so that a mutually convenient time for such meeting may be arranged.

Prior to such meeting, however, I would also respectfully request, on behalf of our client, that a copy of this letter, which is enclosed herewith for that purpose, be forwarded to your superior officers on the Commission's staff in Washington and that you please be good enough to ask your superior officers to furnish us a statement of the necessity for what would obviously be a further, costly and time-consuming effort on the part of our client to prepare the additional information requested from our client.

Respectfully yours,

/s/ Horace R. Lamb

[fol. 158]

Exhibit 32

Federal Trade Commission

Washington 25

New York Branch Office:
U. S. Court House,
Foley Square,
New York 7, N. Y.

July 14, 1958

Mr. Horace R. Lamb,
Le Boeuf, Lamb & Leiby,
15 Broad Street,
New York 5, N. Y.

In re: File No. 5510696
St. Regis Paper Co.

Dear Mr. Lamb:

This will acknowledge receipt of your letter of July 10, 1958, in reference to my letter of June 30, 1958, and the memoranda of request for information concerning the various companies whose stock or assets were acquired by St. Regis.

In accordance with your request set out in the last paragraph of your letter, I am forwarding the copy, which you enclosed, to the Washington office for appropriate consideration. I can advise you, however, that prior to submitting my letter of June 30th with the attached memoranda, I visited the Washington office, conferred with my superior officers and, as a result of that conference, it was decided that the information outlined in the memoranda forwarded to you was necessary for the completion and disposition of the subject investigation.

I fully realize that the information, which has been requested, will require several weeks for completion. I trust, [fol. 159] however, that you will see your way clear to prepare this information and furnish it not later than August 22, 1958.

Very truly yours,

FEDERAL TRADE COMMISSION

/s/ CHARLES E. STROUD

Charles E. Stroud,
Attorney

[fol. 160]

EXHIBIT 33

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN C. LEIBY
CAMERON F. MACRAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
CRAIGH LEONARD
JAMES O'MALLEY, JR.
JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N.W.
WASHINGTON 6, D. C.

July 23, 1958

Charles E. Stroud, Esq., Attorney
Federal Trade Commission
New York Branch Office
United States Court House
Foley Square
New York 7, N. Y.

In re File No. 5510696
St. Regis Paper Company

Dear Mr. Stroud:

There has been no earlier opportunity to acknowledge receipt of your letter of July 14th. As I indicated at some length in my letter of July 10th, before my client should be put to the expense and time of preparing such a large volume of additional material I think it is entirely reasonable and proper there should be furnished my client some

further statement, other than contained in your letter of June 30th, as to the necessity for any further information relating to the acquisition by my client of the stocks of the 8 corporations listed at the top of page 2 of my letter of July 10th. I am hopeful, therefore, that in forwarding a copy of my letter you have urged your superior officers in the Commission to give careful consideration to such letter and the request therein. In the circumstances, pending a further statement from the authorized representative of the Commission, I have informed my client that no effort should be made to attempt to gather additional information relating to the acquisition by our client of the stock of such 8 corporations.

In that connection, I would like to add that if your superiors in Washington deem it desirable that there be any further personal conference either in New York or in Washington regarding the foregoing, I shall be pleased to attend such conference at a mutually agreeable time.

Your letter of July 14th makes no reply to the question raised on page 4 of my July 10th letter regarding the furnishing of a copy of our client's registration statement recently filed with the Securities and Exchange Commission relating to the proposed offer of exchange of shares of our client's authorized but unissued common stock in exchange [fol. 161] for shares of the capital stock of Growers Container Corporation, held by others than our client. The registration statement has not as yet become effective, but, as I indicated in my letter, it is expected that it should become effective the latter part of this month or early in August. There is presently available at this office a printed proof copy of such registration statement, as filed, and if you desire, a copy will be made available for your examination. Please let me know your wishes in this respect.

Finally, your letter makes no reply to the question raised on page 5 of my letter of July 10th, whether you desire to have a further discussion regarding the type and volume of information requested. I assume you are deferring answering that question until you have further word from your superiors in Washington.

I recently learned from Mr. Crawford, Secretary of St. Regis Paper Company, that you had sent him copies of your two letters to me and that on the bottom of the copies sent him there were typed words indicating that copies were to go to Mr. Crawford. You did not note on the bottom of either of your two letters to me that you were sending copies of your letter directly to Mr. Crawford.

I am assuming that such omission on your part was inadvertent, because I am sure you recognize that where, as here, a party is represented by counsel, an attorney for the Commission would not expect to deal directly with the party.

Yours very truly,

/s/ HORACE R. LAMB

[fol. 162]

EXHIBIT 34

FEDERAL TRADE COMMISSION

WASHINGTON 25

New York Branch Office:
U. S. Court House,
Foley Square,
New York 7, N. Y.

July 28, 1958

Horace Lamb, Esq.,
LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, N. Y.

In re: Our File No. 5510696
St. Regis Paper Company

Dear Mr. Lamb:

This will acknowledge receipt of your letter of July 23rd, a copy of which has been forwarded to the Washington office of the Commission.

First, I would like to tell you that I have no intention or desire to deal directly with your client in connection with this investigation. An examination of my file indicates that at the bottom of the last page of my letters of June 30th and July 14th, there appears the following:

"CC: Mr. Homer Crawford, Secretary
St. Regis Paper Company,
150 East 42nd Street,
New York, N. Y."

I assumed that the same wording appeared on the last page of the originals and cannot understand why it did not appear. Certainly if I had desired to deal directly with Mr. Crawford, I would not have addressed the letters to you, but to him as secretary of the company.

[fol. 163] I have been informed by the Washington Office that a letter addressed to you has been approved for forwarding to you concerning the necessity for the information requested in my letter of June 30th and you should receive that letter not later than Wednesday of this week. Since it is apparent that you do not consider me "an authorized representative of the Commission", I trust that upon receipt of the mentioned letter, you will immediately authorize your client to assemble the information requested in the memoranda attached to my letter of June 30th. Under the circumstances, I do not feel that it will be necessary to arrange a conference for the discussion of the type and volume of the information requested.

In connection with the registration statement recently filed with the Securities and Exchange Commission relating to the proposed offer of exchange of shares of St. Regis' authorized but unissued common stock in exchange for shares of the capital stock of Growers Container Corporation, I would certainly like to have the privilege of examining the proof copy of such statement and, if possible, have a copy for inclusion in the file. If the offer is accepted by the shareholders of Growers Container Corporation, it will also be necessary for me to request additional information concerning the matter.

Please advise me at your earliest convenience as to when I may expect to receive the information previously requested.

Very truly yours,

/s/ CHARLES E. STROUD

Charles E. Stroud,
Attorney

CC: Mr. Homer Crawford,
Secretary, St. Regis Paper Co.
150 East 42nd Street,
New York, N. Y.

[fol. 164]

EXHIBIT 35

FEDERAL TRADE COMMISSION

WASHINGTON 25

BUREAU OF INVESTIGATION
OFFICE OF
CHIEF PROJECT ATTORNEY

Jul 30 1958

LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York.

Attention: Mr. Horace R. Lamb.

Re: File 5510696,
St. Regis Paper Company.

Gentlemen:

Pursuant to your request, Attorney Charles Stroud, of the Commission's New York office, has forwarded to this office for consideration a copy of your letter of July 10, 1958, which is in reply to his letter of June 30, transmitting a memorandum listing additional items of information requested of your client, St. Regis Paper Company.

Your letter requests that Mr. Stroud's superiors provide you with a statement of the necessity for the additional information requested of St. Regis Paper Company.

As stated in Attorney Stroud's letter of June 30, the additional information is needed in order that the Commission may complete its investigation relating to St. Regis Paper Company's acquisition of the securities or assets of various corporations. As you were previously advised, the investigation is being conducted with a view to determining whether any of the acquisitions constitute possible violation of Section 7 of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission Act.

The information previously obtained from St. Regis Paper Company in response to the Commission's subpoena, together with the additional information requested in the memorandum attached to Attorney Stroud's letter of June 30, is substantially the same as that which the Commission seeks to obtain in all matters arising under Section 7 of the [fol. 165] Clayton Act, as amended. Such information is needed as a basis for determination as to whether or not the effect of a given acquisition or series of acquisitions may be substantially to lessen competition in any line of commerce in any section of the country, or to tend to create a monopoly.

In conclusion you are advised that the memorandum of request submitted by Attorney Charles Stroud was authorized and approved by this office prior to its delivery.

Your full cooperation with Mr. Stroud in this matter is requested.

Sincerely yours,

/s/ SAMUEL L. WILLIAMS

Samuel L. Williams,
Chief Project Attorney.

[fol. 166]

EXHIBIT 36

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN C. LEIBY
CAMERON F. MACRAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
CRAIGH LEONARD
JAMES O'MALLEY, JR.
JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N.W.
WASHINGTON 6, D. C.

August 5, 1958

[Stamp—Bureau of Investigation Records—Aug. 7, 1958.]

Samuel L. Williams, Esq.
Chief Project Attorney
Federal Trade Commission
Bureau of Investigation
Washington 25, D. C.

Re: File No. 5510696
St. Regis Paper Company

Dear Mr. Williams:

This acknowledges receipt of your letter dated July 30, 1958 which I understand is in reply to my letter dated July 10, 1958 addressed to Mr. Charles E. Stroud, Attorney for the Commission at the New York Branch Office, and which acknowledges Mr. Stroud's letter of June 30, 1958.

As I pointed out at some length in my letter of July 10th, it appears to my client and to me that at the conclusion of the conference on December 13, 1957 with Mr. Seidman and Mr. Stroud in New York all of the information reasonably required by the Commission, and which our client was in a position to furnish, relating to the 8 companies mentioned on page 2 of my letter of July 10th, had been furnished. Furthermore, the acquisition of those 8 companies having been completed as long ago as the period from September 15, 1954 through April, 1956, it is difficult to understand why, as requested in Mr. Stroud's letter of June 30, 1958, further information should be required in respect of the years 1956 and 1957 regarding the acquisition of those 8 companies. In the period since the acquisition of those 8 companies was completed, as a part of our client's plans for the integration of the acquired companies with our client's business, numerous changes have been effected so that the requested information regarding the production and business of the acquired companies for the years subsequent to the acquisition would present a rather different situation than that which existed at the time of or prior to the acquisition.

[fol. 167] It was for this reason that I requested that Mr. Stroud's superiors, which presumably includes your office, should furnish some statement to our client and to me regarding the necessity for the additional information.

Your letter of July 30th, in only general terms, states, in effect, that the information is merely needed as a basis for your determination whether the effect of such acquisitions "may be substantially to lessen competition in any line of commerce in any section of the country, or to tend to create a monopoly", which, of course, is merely a statement of the provisions of Section 7 of the Clayton Act.

The information previously furnished states the factual situation, namely, that at the time of the acquisition of each of the 8 companies named, our client was not engaged in the manufacture, use or sale of any of the products which were then being produced and sold by the acquired companies. The purpose of the acquisitions was to extend the business

of our client into new and additional products, thereby further integrating our client's business. It seems reasonably clear, therefore, that on the basis of such information the Commission may determine whether there is any basis to sustain a claim that competition was lessened by the acquisition of any of the 8 companies and reach a conclusion whether the "effect" of the acquisitions presents any question under Section 7. In the circumstances, I think you will agree that our client should receive from the Commission's staff a more specific statement of the reasons why additional information is needed.

There is, furthermore, a reluctance on the part of our client to furnish, even to members of the Commission's staff, by name and address, such confidential information as the 10 largest customers and dollar volume of sales to each, as requested in Mr. Stroud's letter.

As to the 2 lumber companies whose stocks were acquired in the latter part of 1956 and the first part of 1957, if the Commission's staff has had an opportunity to review the factual matter shown in the registration statements relating to each of such acquisitions, as previously furnished, we believe that the facts shown therein should suffice to establish that no competition was lessened in connection with those acquisitions by reason of the difference in the character and kinds of timber products sold by the 2 companies and the differences in the locations of their respective plants and forest lands.

[fol. 168] The numerous items in respect of each of the companies is so substantial and would require such extensive time and effort to complete that before embarking on the task of preparing the additional information, we believe there should be a further, factual statement submitted by the Commission showing the necessity therefor.

Regarding the proposed acquisition of additional shares of the capital stock of Growers Container Corporation, we have previously informed Mr. Stroud that as soon as the registration statement relating to that matter has been completed and made effective, which we hope will occur in

the next week or so, a copy of that registration statement will be furnished the Commission for its examination.

As the Commission's staff knows, our client and we, as its counsel, have endeavored to cooperate fully with the Commission by a personal visit nearly 2 years ago (on September 25, 1956) with the Commission's staff in Washington, by meetings in New York with an attorney, an accountant and an economist for the Commission, and by causing to be prepared and furnished to the Commission considerably more than 200 separate writings, documents and copies of reports, as requested by the Commission's staff. Both in the letter of Mr. Stroud dated July 14th and in your letter of July 30th there is lacking any statement to indicate that the vast amount of information previously furnished has been reviewed and any conclusions reached thereon, although a statement of such conclusions was requested in October, 1957, of Mr. Hale, Legal Adviser of the Commission's Bureau of Investigation.

Your statement that the additional information requested is "substantially the same as that which the Commission seeks to obtain in all matters arising under Section 7 of the Clayton Act, as amended", is, we submit, not very informative in the present circumstances. Obviously, each acquisition of shares or assets of another corporation presents a unique situation and the "Memorandum of Request for Information" which accompanied Mr. Stroud's letter of June 30, 1958, was prepared for this particular investigation.

I think it is worth repeating here that, subsequent to the October 1957 conference at the Commission's New York office in connection with this matter, which was attended by Mr. Hale and another Washington representative of the Commission, on December 13, 1957, Mr. Seidman stated on the stenographic record of the conference in this matter [fol. 169] that all requested papers, documents and records in the control of our client had been "fully furnished" and that the matter "was concluded".

Excepting only in the case of the proposal of our client to acquire additional shares of Growers Container Corpora-

tion, for which a registration statement is now pending before the Securities and Exchange Commission, as mentioned above, all of the acts and transactions regarding the matters inquired about in the Commission's "Memorandum of Request for Information" which accompanied Mr. Stroud's letter of June 30, 1958, were fully completed prior to September 1, 1957, so that by this time all of the relevant facts relating thereto could have been fully investigated by the Commission and a conclusion reached thereon.

It is respectfully submitted, therefore, that in the present situation there are special circumstances presented which fully warrant our request for a factual statement of the necessity for carrying this same investigation further, as proposed in the numerous items of the aforementioned memorandum.

It is further respectfully requested that we be granted an opportunity to confer with a responsible officer of the Commission's Bureau of Investigation in Washington, at which time the memorandum annexed to Mr. Stroud's letter of June 30th be reviewed in the light of the information heretofore furnished the Commission on behalf of our client. At such conference there should be considered the question whether any of the additional information is essential to the Commission's further investigation, or, if so, whether the numerous items therein may be limited to matters on which information has not previously been requested and which are relevant and material to the Commission's further investigation.

Respectfully yours,

/s/ HORACE R. LAMB

cc: Charles E. Stroud, Esq.

[fol. 170]

EXHIBIT 37

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ARTHUR C. LEIBY
CARLETON F. MACRAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROWNE
CHARLES LEONARD
JAMES O'MALLEY, JR.
JOHN L. GREER
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N.W.
WASHINGTON 6, D. C.

August 12, 1958

Charles E. Stroud, Esq., Attorney
Federal Trade Commission
New York Branch Office
United States Court House
Foley Square
New York 7, N. Y.

In re File No. 5510696
St. Regis Paper Company

Dear Mr. Stroud:

As promised in my recent correspondence, I am pleased to enclose herewith a copy of the prospectus forming a part of a registration statement filed with the Securities & Exchange Commission relating to the offer of St. Regis

to exchange shares of its common stock for outstanding shares of the capital stock of Growers Container Corporation, held by others than St. Regis.

As I previously informed you, St. Regis presently owns 1,000,000 shares of the capital stock of Growers which was purchased for cash in January, 1956.

The prospectus has been sent to all holders of Growers capital stock other than St. Regis. The offer of exchange will be outstanding until August 30, 1958, unless such time is extended, all as more fully provided in the terms of the offer stated in the enclosed prospectus.

I think that the enclosed prospectus will give you complete information regarding the business and properties of Growers, as well as its financial statement and also information regarding the business and properties of St. Regis, including its financial statements.

The information regarding the business of Growers shows that it has manufacturing plants at Salinas and Fullerton, California, and also at Eastport, near Jacksonville, Florida, for the manufacture of containers primarily designed for food products.

[fol. 171] At the time of the acquisition of the 1,000,000 shares of Growers, St. Regis did not own or operate, and it does not now own or operate, any container plants in California or Florida, either directly or through its subsidiaries.

It seems reasonably clear, therefore, that there could be no question arising under Section 7 of the Clayton Act in connection with the proposed acquisition of the additional shares of the capital stock of Growers pursuant to the offer set forth in the prospectus enclosed herewith.

If you have any further questions regarding this matter, please let me know.

Yours very truly,

/s/ Horace R. Lamb

Per: M. H.

Enclosure

Italicized material denotes handwritten notation.

[fol. 172]

EXHIBIT 38

FEDERAL TRADE COMMISSION

WASHINGTON 25

BUREAU OF INVESTIGATION
OFFICE OF
CHIEF PROJECT ATTORNEY

AUG 22 1958

LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York.

Attention: Horace R. Lamb, Esq.

Re: File No. 5510696,
St. Regis Paper Company

Gentlemen:

This will acknowledge receipt of your letter of August 5, 1958, in reply to Chief Project Attorney Samuel L. Williams' letter of July 30, relative to your request for a statement of the necessity for the additional information requested of your client, St. Regis Paper Company, by Attorney Charles Stroud of the Commission's New York Office.

You state that the reasons set forth in Mr. Williams' letter of July 30 are general in nature, and merely restate the provisions of Section 7 of the Clayton Act. You further state that because of the volume of information requested, and the work required in assembling the information, you believe that you are justified in asking for a more specific statement of the reasons why the additional information is needed.

It appears that your apparent lack of understanding of our need for the additional information requested of your client may be due to some misconception of the meaning and intent of Section 7. For example, in paragraph 3, page 2, of your letter, you state that the information previously furnished shows that the products or product-lines of St.

Regis differed from those of the acquired companies and that the purpose of the acquisitions was to give St. Regis new and additional product-lines. You also state that it seems reasonably clear that on the basis of such information the Commission may make a determination as to whether competition has been lessened as a result of any of the acquisitions under investigation.

[fol. 173] The legislative history relating to the enactment of Section 7, as amended, clearly indicates that Congress intended that the Act should have broad application to all acquisitions economically significant. The purpose of the Act and the competitive area which it embraces are made clear in the report of the House Committee on the Judiciary. The said report states:

> "The bill applies to all types of mergers and acquisitions, vertical and conglomerate as well as horizontal, which have the specified effects of substantially lessening competition • • • or tending to create a monopoly.
>
> "If, for example, one of a number of raw material producers purchases firms in a fabricating field (i.e., 'forward vertical' acquisition), and if as a result thereof competition in that fabricating field is substantially lessened in any section of the country, the law would be violated, even though there did not exist any competition between the acquiring (raw material) and the acquired (fabricating) firms."

Your attention is also invited to the Supreme Court's decision (June 3, 1957) in the DuPont-General Motors case, wherein the Court stated:

> "We hold that any acquisition by one corporation of all or any part of the stock of another corporation, competitor or not, is within the reach of the section whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce or in the creation of a monopoly in any line of commerce • • • ."

In paragraph 2 of your letter you state that the acquisitions under investigation were completed sometime ago

during the period from September 15, 1954, through April 1956, and, therefore, it is difficult for you to understand the reason for requesting information relating to the production and business of the acquired companies for the years (1956 and 1957) subsequent to the acquisitions. Such [fol. 174] information is necessary for the purpose of ascertaining the economic impact on competition since the acquisitions. In the DuPont-General Motors case, the lessening of competition was largely based on developments which transpired subsequent to the acquisition.

In our opinion, the statement of necessity for the additional information, as set forth in our previous letter, is both adequate and responsive. Nevertheless, in compliance with your request, some further elaboration on the statement will be made. The Commission has the responsibility of identifying each line of commerce and section of the country in which competition may be substantially lessened as a result of each of the acquisitions under investigation. It must then determine, for each of the markets thus defined, the roles of the acquiring and acquired companies prior to the acquisitions and the role of the surviving company in the period since the acquisition. It must also consider such other information with respect to each of these markets as to permit it to judge the significant effects of each acquisition.

Exception must be taken to your statement to the effect that both you and your client have "endeavored to cooperate fully with the Commission * * * " by preparing and furnishing over 200 documents and in other ways. As you know, the investigation in this matter was initiated in September 1956, at which time a letter was delivered to your client requesting certain information and material. The data so requested were submitted over a year later in response to a Commission subpoena.

Your request for an opportunity to confer with responsible members of the staff of this Bureau in Washington for the purpose of reviewing Attorney Stroud's letter of June 30 and the attached memorandum of request, in the light of information previously submitted, and also

for the purpose of deciding whether any of the requested information is essential to the completion of the investigation, is noted.

The information previously obtained from St. Regis has been the subject of careful analysis. This analysis disclosed the need for the additional information as specified in Attorney Stroud's memorandum of request. You are assured that it is not our intention to request any informa-[fol. 175] tion which is not essential, nor is it our intention to impose any unreasonable burden on your client.

This matter has been assigned to Attorney Stroud, who is responsible for the satisfactory completion of the investigation. Attorney Stroud is one of the Commission's most competent employees and has had the benefit of many years of experience in the conduct of investigations of this nature. In his letter of June 30, he offered to discuss with you and your client questions relating to the type and volume of information requested in his memorandum. Mr. Stroud undoubtedly will give due consideration to any reasonable request for modification or change of his memorandum. It is suggested, therefore, that you provide an opportunity for Mr. Stroud to meet with you and persons conversant with the company's records for the purpose of discussing the memorandum of request and any problems which your client may face in assembling the information and material requested therein.

In view of the time which has elapsed since the initial request, it is hoped that you will make a special effort to furnish the additional information and material at an early date. In investigations of this nature, our experience indicates that most companies are able to assemble the type of information specified in Attorney Stroud's memorandum in less than six weeks.

Sincerely yours,

/s/ Frank C. Hale

Frank C. Hale,
Acting Chief Project Attorney.

cc: Charles E. Stroud,
New York Branch Office.

[fol. 176]

EXHIBIT 39

FEDERAL TRADE COMMISSION

WASHINGTON 25

New York Branch Office:
U. S. Court House,
Foley Square,
New York 7, N. Y.

August 28, 1958.

Horace R. Lamb, Esq.,
LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, N. Y.

In re: File No. 5510696,
St. Regis Paper Co.

Dear Mr. Lamb:

This will acknowledge receipt of your letter of August 12th enclosing a copy of the prospectus forming a part of a registration statement filed with the Securities & Exchange Commission by St. Regis Paper Co. dated August 7, 1958, which I found on my desk when I returned from vacation. This will also acknowledge a copy of your letter of August 5, 1958, addressed to Samuel L. Williams, Chief Project Attorney, in connection with the subject investigation.

I have just received a copy of a letter addressed to you by Frank C. Hale, Acting Chief Project Attorney, dated August 22, 1958. I will be glad to meet with you and any officials of your plant to discuss the memoranda of requests for information forwarded with my letter of June 30, 1958.

Very truly yours,

FEDERAL TRADE COMMISSION

/s/ CHARLES E. STROUD

Charles E. Stroud,
Assistant Attorney in Charge,
New York Office.

[fol. 177]

EXHIBIT 40

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN C. LEIBY
CAMERON F. MACRAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
CRAIGH LEONARD
JAMES O'MALLEY, JR.
JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N.W.
WASHINGTON 6, D. C.

August 28, 1958

[Stamp—Bureau of Investigation—Records—SEP 5 1958.]

Frank C. Hale, Esq.,
Acting Chief Project Attorney
Bureau of Investigation
Federal Trade Commission
Washington 25, D.C.

Re: File No. 5510696 *to New York 3-18-58*
St. Regis Paper Company

Dear Sir:

Your letter of August 22nd with reference to the above matter arrived during Mr. Lamb's absence from the office. It shall be called to his attention promptly after his return next week.

Very truly yours,

/s/ RUTH J. FOERSTER
Secretary to Horace R. Lamb

---

* Italicized material denotes handwritten notation.

[fol. 178]

EXHIBIT 41

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN C. LEIBY
CAMERON F. MACRAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
CRAIGH LEONARD
JAMES O'MALLEY, JR.
JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N.W.
WASHINGTON 6, D. C.

September 10, 1958

[Stamp—Bureau of Investigation—Records—SEP 12 1958.]

Frank C. Hale, Esq.,
Acting Chief Project Attorney
Bureau of Investigation
Federal Trade Commission
Washington 25, D. C.

Re: St. Regis Paper Company—Acquisition of Stocks of Ten Other Companies
File No. 5510696 *to NY 3-18-58*

Dear Sir:

Your letter dated August 22nd in reply to my letter of August 5th to Mr. Williams was received in my absence and acknowledged by Miss Foerster's letter of August 28th.

Italicized material denotes handwritten notation.

It is, of course, disappointing to our client and to me that your letter contains no factual statement indicating the necessity for the extensive additional information as requested in Mr. Stroud's letter of June 30th and the "Memorandum of Request for Information" which accompanied such letter.

Your reference to the provisions of Section 7 of the Clayton Act and portions of the legislative history relating to its enactment is not of much assistance. Likewise, your inviting my attention to the Supreme Court's decision in the Dupont-General Motors case, which was carefully read when first announced, has little, if any, relevance to the matter of our client's acquisitions. In fact, I think it would be proper to suggest that if your Bureau's present investigation is to determine whether our client's acquisitions fall within the holding in the Dupont-General Motors decision, the records and information previously furnished by our client should be found more than adequate to enable your Bureau to determine that our client's acquisitions are entirely distinguishable on their facts.

[fol. 179] In my previous letter to Mr. Williams I pointed out that the paper and converting companies acquired by our client had been integrated into the total business and properties of our client. I might also add that the logging operations of the two lumber companies in the Pacific Northwest area have, in large part, been integrated with our client's logging operations in the timberlands previously held by our client in the State of Washington. The fact that such changes have been made not only presents difficulties in the preparation of the additional information now requested by your Bureau, but, I believe, also demonstrates that the furnishing of the additional information at this late date would not serve any very useful purpose.

There are also further facts which I feel have not been given adequate consideration by the representatives of your Bureau, namely, that the acquisitions of these companies by our client were initiated by representatives of the acquired companies, that the acquired companies were engaged in a different but related line of commerce, and

the combining of these companies with our client effected integration of several separate segments of the paper industry, including the supply of raw materials from woodlands in areas where our client's needs were not theretofore adequately provided, and added new kinds of paper and paper products which our client had not theretofore manufactured.

Furthermore, subsequent to the completion of the transactions, many of the individuals who theretofore held responsible positions in the management of the companies who combined their properties and business with our client have become active participants in the management of St. Regis, either as members of our client's board of directors, officers or other important supervisory positions. In addition, numerous other changes, additions and rearrangement of the properties and business of the acquired companies have occurred, so that the task of procuring the requested additional information is further complicated.

I regret that you find it necessary to take exception to my previous statement that our client and I have endeavored to cooperate fully with the Commission in the several conferences I have had with your representatives and by voluntarily furnishing your representatives more than 200 documents and records from the files of our client. In this respect we believe that on the present record any impartial tribunal would sustain our position.

[fol. 180] Likewise, it is disappointing that, without any explanation thereof, you merely state that an analysis of the information previously furnished "disclosed the need for the additional information as specified in Attorney Stroud's memorandum of request". If such analysis has been completed, it would seem only reasonable and fair that our client should be entitled to know the factual conclusions of your Bureau concerning the large volume of information previously furnished before subjecting our client to a substantial additional burden and expense at this late date.

Your letter ignores completely what is perhaps the most significant fact in this investigation, namely, that at the

conference with the Commission's attorneys regarding these acquisitions held on December 13, 1957, in the Commission's New York office, the attorney for the Commission conducting the conference stated that " . . . the hearing in the above entitled matter is concluded." At the same time the Secretary of our client was discharged from any further response to the Commission's subpoena duces tecum previously served on our client.

As you have doubtless learned, under date of August 12th we furnished Mr. Stroud a copy of our client's Prospectus relating to our client's offer of exchange for the outstanding shares of the capital stock of Growers Container Corporation, other than the 1,000,000 shares of such stock owned by our client and which were the subject of discussion with you and other members of the Commission's staff at our first conference in Washington on September 25, 1956. Mr. Stroud has acknowledged receipt of such Prospectus under date of August 28th, but to date he has not indicated the necessity for any further information relating to that matter, although he has indicated a willingness to meet and discuss the Memorandum.

Before Mr. Stroud and I attempt to discuss the Memorandum, I sincerely believe there should be a further review by the head of the Bureau of Investigation of this whole matter. I, therefore, respectfully request that a copy of this letter and copies of our recent correspondence [fol. 181] be placed before the appropriate officer in the Bureau, with the request, which is hereby made, that, in view of the large volume of information previously furnished the Commission by our client and of the additional circumstances which I have described in my recent letters, the Bureau give consideration to the issuance of a directive that the Memorandum and the request made in Mr. Stroud's letter of June 30, 1958 be withdrawn.

Respectfully yours,

/s/ Horace R. Lamb

cc: Mr. Charles E. Stroud

[fol. 182]

EXHIBIT 42

FEDERAL TRADE COMMISSION
WASHINGTON 25

BUREAU OF INVESTIGATION
OFFICE OF THE DIRECTOR

SEP 18 1956

LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York.

Attn: Mr. Horace Lamb.

Re: File 551 0096,
St. Regis Paper Company.

Gentlemen:

In accordance with the request in your letter of September 10, 1956, to Acting Chief Project Attorney, Frank C. Hale, I have reviewed the exchange of correspondence between you and members of the Staff of the Bureau of Investigation. I have also reviewed the "Memorandum of Request for Information" attached to Attorney Stroud's letter of June 30 specifying the additional information and material to be furnished by your client, St. Regis Paper Company.

In my opinion, you have been adequately informed as to the purpose of the investigation and as to the necessity for the additional information requested of your client.

I realize that the work entailed in assembling the information may cause some inconvenience to your client, but this cannot be avoided if the Commission is to carry out its duties and responsibilities under the various statutes which it administers.

The long delay in this investigation, which was initiated in September, 1956, is a matter of grave concern to this

office. Under the circumstances, Attorney Stroud has been instructed to complete the investigation at the earliest date possible. To this end, it is again suggested that you promptly accept Attorney Stroud's offer to meet with you and officials of the company for the purpose of discussing questions relating to the types and volume of information requested in his memorandum.

I have instructed Attorney Stroud to advise me by September 26, 1958, whether or not satisfactory arrangements have been effected for obtaining the requested information from your client on a voluntary basis. If satisfactory arrangements have not been concluded at that time, action will be promptly initiated to secure the production of the information.

Very truly yours,

/s/ Sherman R. Hill

Sherman R. Hill,
Director,
Bureau of Investigation.

cc: Charles E. Stroud.

[fol. 183]

EXHIBIT 43

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ARRIAN C. LEIBY
CAMERON F. MACRAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
CRAIGIE LEONARD
JAMES O'MALLEY, JR.
JOHN L. GREEN
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N.W.
WASHINGTON 6, D. C.

September 22, 1958

[Stamp—Bureau of Investigation—Records—SEP 25 1958.]

Hon. Sherman R. Hill, Director
Bureau of Investigation
Federal Trade Commission
Washington 25, D. C.

Re: St. Regis Paper Company
Your File No. 5510696 (*Widmaier*)
to NY 8-18-58

Dear Sir:

This acknowledges your letter of September 18th in reply to my letter of September 10th to Mr. Hale, Acting Chief Project Attorney for your Bureau.

Italicized material denotes handwritten notation.

It is noted that you have reviewed the exchange of correspondence between members of the Bureau's Staff and me regarding the above company, and that you have also reviewed the "Memorandum of Request for Information" which accompanied Mr. Stroud's letter of June 30, 1958, addressed to me.

There is no indication that you have examined the large volume of information, or any analysis thereof by your Bureau, previously furnished by our client to your Bureau in response to a letter of Mr. Stroud dated September 7, 1956 to our client, and also the subject of a subpoena duces tecum issued by the Commission to our client dated September 13, 1957.

Likewise, it does not appear that you have considered the closing portions of the stenographic record of the so-called "hearing" in this matter before the Commission's attorney, Mr. Seidman, on December 13, 1957 at the New York office of the Commission. I quote from that record the following (at page 89):

> "MR. SEIDMAN: It now appearing that with the exception of the census reports which will, when received, be furnished by mail, that the witness has fully responded to all specifications of the subpoena to the extent that the papers, documents and records requested were within his control as Secretary of St. Regis Paper Company, this hearing is terminated.
> [fol. 184] "MR. LAMB: And the witness discharged, subject to the mailing.
> "MR. SEIDMAN: And Mr. Crawford relieved from further obligation under the subpoena duces tecum subject to his furnishing the copies of the census reports, when received.
>
> (Whereupon, at 12:05 p.m., December 13, 1957, the hearing in the above-entitled matter was concluded.)"

It is respectfully submitted that the foregoing recorded action by the Commission's duly designated attorney con-

stituted a formal ending of the Commission's investigation, initiated in September, 1956, of our client's stock acquisitions all of which, except in the case of the proposed acquisition of additional shares of the capital stock of Growers Container Corporation, were completed long prior to December 13, 1957.

In the circumstances, I am sure you will appreciate that I and my client have been deeply disturbed to receive Mr. Stroud's letter of June 30, 1958 and the 13 page "Memorandum of Request for Information" which accompanied that letter, and in which there are more than seventy separate items of requested information relating to such acquisitions, the furnishing of which would impose an onerous and expensive burden on our client.

Furthermore, I am prepared to demonstrate to your office that there are no valid grounds for the "grave concern" on the part of your office regarding any delays in the completion of the investigation initiated in September, 1956. On the contrary, my client and I endeavored with promptness and in every reasonable manner to comply with the Commission's proper request for information in that investigation which, as shown above, has been "concluded".

I must also take issue with your opinion that I have been "adequately informed" as to the "purpose" and "necessity" for the new investigation initiated by Mr. Stroud's further letter of June 30, 1958. Although a statement of the purpose and the necessity therefor has been repeatedly requested, none has been furnished. So far as I am aware, there is no provision of the Clayton Act or any other statute obligating a corporation to furnish periodically to the [fol. 185] Commission information regarding acquisitions of stocks or assets of other corporations completed at prior dates, particularly where, following those acquisitions, the Commission, at its request, has previously been furnished all of the information under the control of the corporation from which the information was requested.

I think it is pertinent to note, in this connection, that in two recent sessions of Congress, namely, the 84th Congress,

2d Session, and the 85th Congress, 1st Session, bills were introduced, the purpose of which was to compel a corporation engaged in commerce to give prior notice and furnish prescribed information to the Commission and the Attorney General regarding a proposed acquisition of the stock or assets of another corporation engaged in commerce. Those bills failed of enactment into laws although extensive hearings were conducted thereon by congressional committees and representatives of the administration urged adoption. It seems to us that your Bureau is attempting, by Mr. Stroud's letter of June 30th and the memorandum which accompanied it, to obtain from our client information effecting acquisitions which long ago were completed and which Congress declined to authorize in the case of prospective acquisitions.

I am, of course, willing to discuss with Mr. Stroud, at a mutually convenient time, the problem which has been raised by his letter of June 30th and the memorandum which accompanied it, if Mr. Stroud is of the opinion that such discussion will serve a useful purpose.

Respectfully yours,

/s/ Horace R. Lamb

cc: Charles E. Stroud

[fol. 186]

EXHIBIT 44

FEDERAL TRADE COMMISSION

WASHINGTON 25

BUREAU OF INVESTIGATION
OFFICE OF THE DIRECTOR

SEP 26 1958

LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York.

Attention: Mr. Horace Lamb.

Re: File No. 5510696,
St. Regis Paper Company.

Gentlemen:

Your letter of September 22, 1958, which is in reply to my letter of September 10, has been received.

I have been informed that you and Attorney Charles Stroud, of the Commission's New York Office, have agreed to meet on October 7 for the purpose of discussing the "Memorandum of Request for Information" which accompanied Attorney Stroud's letter of June 30.

It is my sincere hope that at this meeting an understanding will be reached for obtaining the requested information from your client on a voluntary basis.

Sincerely yours,

/s/ SHERMAN R. HILL

Sherman R. Hill,
Director,
Bureau of Investigation.

cc: Charles E. Stroud,
New York Branch Office.

[fol. 187]

EXHIBIT 45

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN C. LEIBY
CAMERON F. MAC RAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
CRAIGH LEONARD
JAMES O'MALLEY, JR.
JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N. W.
WASHINGTON 6, D. C.

November 7, 1958

Charles E. Stroud, Esq., Attorney
Federal Trade Commission
New York Branch Office
United States Court House
Foley Square
New York 7, New York

In re File No. 5510696
St. Regis Paper Company

Dear Mr. Stroud:

Since our conference at this office on October 9, 1958, I have endeavored to gather some of the information requested in the memorandum which accompanied your letter to me dated June 30, 1958. I have compiled and have assembled this information at my office, and at a mutually agreeable time will submit it for your examination, and to take copies thereof.

At the present time I am engaged in a trial at the United States District Court before Judge Ryan and a jury, which

I am hopeful will be concluded in about 10 days. Promptly thereafter I hope we will be able to get together and discuss the foregoing.

Yours very truly,

/s/ HORACE R. LAMB

cc: Hon. Sherman R. Hill,
Director,
Bureau of Investigation
Federal Trade Commission
Washington 25, D. C.

[fol. 188]

EXHIBIT 46

FEDERAL TRADE COMMISSION

WASHINGTON 25

New York Branch Office:
U. S. Court House,
Foley Square,
New York 7, N. Y.

November 10, 1958.

Horace R. Lamb, Esq.,
LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York.

In re: File No. 5510696,
St. Regis Paper Company.

Dear Mr. Lamb:

This will acknowledge receipt of your letter of November 7th. I will expect to hear further from you in connection with the information you are assembling when you conclude the trial in which you are now engaged.

Very truly yours,

/s/ CHARLES E. STROUD

Charles E. Stroud,
Assistant Attorney in Charge,
New York Office.

[fol. 189]

EXHIBIT 47

UNITED STATES OF AMERICA

Before the

FEDERAL TRADE COMMISSION

COMMISSIONERS:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY

MOTION TO VACATE RESOLUTION AND ORDERS REQUIRING SPECIAL REPORTS PURSUANT THERETO

Dated: January 19, 1959

LAW OFFICES OF

LE BOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

[fol. 190]

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY

MOTION TO VACATE RESOLUTION AND ORDERS REQUIRING SPECIAL REPORTS PURSUANT THERETO

St. Regis Paper Company (herein called "St. Regis"), by its attorney Horace R. Lamb, Esq., moves the Commission for an order or orders, as follows:

1. Setting aside, rescinding and revoking in all respects the Commission's purported resolution entitled "RESOLUTION DIRECTING INVESTIGATION OF THE ACQUISITION BY ST. REGIS PAPER COMPANY OF THE STOCK OR ASSETS, OR BOTH THE STOCK AND ASSETS, OF OTHER CORPORATIONS" and the Commission's purported "Order Requiring Filing Report" in the form of a letter on the letterhead of the Commission, bearing a stamped date "January 9, 1959", purporting to be made pursuant to said resolution, addressed to St. Regis and signed by direction of the Commission by Robert M. [fol. 191] Parrish, as Secretary, copies of which said resolution and letter were delivered by registered mail to St. Regis at its office in New York on January 12, 1959, as well as all other similarly entitled purported orders, purportedly made pursuant to said resolution, in the form of separate letters, bearing the same date and similarly signed, addressed to former corporations heretofore merged into St.

Regis and other corporations whose stocks or assets have heretofore been acquired by St. Regis, and received by St. Regis or said other corporations on January 12, 1959, on the following grounds:

(a) That the adoption of said purported resolution and making said purported orders was not authorized by law;

(b) That in adopting said purported resolution and making said purported orders the Commission acted beyond and in excess of the powers delegated to the Commission in Section 6, subdivisions (a) and (b), of the Federal Trade Commission Act (15 U.S.C., Sec. 46 (a) and (b)), on which the Commission purportedly relied in the adoption of said purported resolution and issuing said purported orders;

(c) That the said provisions of the said Federal Trade Commission Act does not confer any power upon the Commission to require information from any corporation relating to an alleged violation of Section 7 of the Clayton Act, as amended (15 U.S.C., Sec. 18);

(d) That the information relating to the acquisitions by St. Regis of the stock or assets of other corporations heretofore furnished voluntarily to the Commission and its [fol. 192] representatives by St. Regis during the period since September 7, 1956 to date is adequate, without the necessity of any further special report to enable the Commission to reach a determination (which, in the circumstances, is the only determination that can be made by the Commission), namely, that in the acquisitions by St. Regis of the stock or assets of other corporations St. Regis has not violated any provision of Section 7 of the Clayton Act.

(e) That in adopting the said purported resolution and issuing said purported order, the Commission has acted without any prior notice to St. Regis and without any opportunity of St. Regis to be heard by the Commission or by any of its representatives, and has acted in conflict with and contravention of the understandings and arrangements voluntarily entered into between the duly authorized representatives of the Commission and the attorneys for St. Regis with regard to the furnishing by St. Regis, on a voluntary basis, of information relating to the acquisitions by

St. Regis of the stocks or assets of other corporations, all of which arrangements and the correspondence relating thereto bear the same file number, to wit, 5510696, as does the said purported resolution and purported order of the Commission mentioned above.

(f) That compliance with said purported resolution and said purported order would duplicate a considerable part of the information heretofore furnished or being furnished [fol. 193] by St. Regis to the Commission, and compliance would, therefore, be unreasonable, unnecessarily repetitious, annoying, burdensome and cause St. Regis, its officers, employees and representatives to expend valuable time and effort thereto, particularly at a time when the persons in the employ of St. Regis who would be responsible for the preparation of the information directed to be furnished are engaged in the completion of numerous other duties relating to the accounting and recording of the business and affairs of St. Regis for the year ended December 31, 1958 and the preparation and issuance of the annual report of St. Regis to its stockholders which is due to be issued on or about March 15, 1959.

2. Alternatively, that the purported order be suspended for such reasonable period as will enable counsel for St. Regis to continue conferences with representatives of the Commission to whom St. Regis has previously furnished and is willing to continue to furnish, on a voluntary basis, such further information and documents to supplement, but not duplicate, the information reasonably required to enable the Commission to conclude its investigation previously commenced on a voluntary basis.

3. That a date for the hearing of this motion be set for 11:00 A.M. on Tuesday, January 27, 1959, before the full Commission at its office in the City of Washington, at which time counsel for St. Regis may be granted an opportunity to be heard orally and to file any necessary brief or [fol. 194] other documents which may properly be considered by the Commission in support of this motion; and in the event that this motion cannot be heard on said date, that the hearing of said motion be set down at a date sub-

sequent to February 22, 1959, for the reason that during the period from January 29 to approximately February 21, 1959 counsel for St. Regis will be absent and otherwise engaged;

4. That pending the hearing and determination of this motion, as requested herein, the Commission, by an appropriate order or orders, suspend any requirement on the part of St. Regis to comply with the said purported resolution and the said purported orders requiring the filing of special reports, as hereinabove mentioned;

5. That, without prejudice to the relief requested herein and notwithstanding the determination of this motion or any part thereof, because of the shortness of time and the large volume of information to be included in the several special reports called for by the several purported orders pursuant to said purported resolution, the Commission extend until March 15, 1959 the time within which said special reports may be filed with the Commission, and

6. That the Commission grant St. Regis and each of the other said corporations whose stocks or assets, or both, have been acquired by St. Regis such other, further, different and additional relief as in the premises may be just and proper.

Respectfully submitted,

ST. REGIS PAPER COMPANY

By /s/ HORACE R. LAMB

Horace R. Lamb
Its Attorney

Dated: January 19, 1959

[fol. 195]

EXHIBIT 51

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY

ORDER SUSPENDING ORDER REQUIRING SPECIAL REPORT AND GRANTING HEARING

The Commission having reconsidered its order of January 23, 1959, denying the motion filed January 22, 1959 by St. Regis Paper Company to vacate the Commission's resolution of January 6, 1959, which instituted for specified purposes an investigation of St. Regis Paper Company and other corporations, and to vacate the Commission's orders of January 9, 1959 requiring St. Regis Paper Company and certain other corporations to file special reports in connection with the said investigation, and having reconsidered its order of February 11, 1959 denying the petition of St. Regis Paper Company filed February 2, 1959 for reconsideration of the said order of January 23, 1959 denying the said motion; and

The Commission, upon reconsideration, being of the opinion that St. Regis Paper Company is entitled to a hearing on some, but not all, of the points made in the said motion filed January 22, 1959;

IT IS ORDERED that the Commission's order of January 23, 1959 denying the said motion of St. Regis Paper Com-

pany and the Commission's order of February 11, 1959 denying the said petition of St. Regis Paper Company, be, and they hereby are, vacated.

[fol. 196] It Is Further Ordered that St. Regis Paper Company be, and it hereby is, permitted to file with the Commission on or before March 27, 1959, a brief in support of its motion filed January 22, 1959 to vacate the Commission's orders of January 9, 1959, requiring special reports, which shall be strictly limited to the contentions that the requirements of the said orders are unreasonable, and that to comply with them would be unreasonably burdensome and would result in unnecessary and unreasonable duplication of documents already furnished to the Commission. In support of its brief, St. Regis Paper Company may file at the same time other documents which may properly be considered by the Commission in connection with these contentions, which may include a descriptive list of all documents heretofore furnished the Commission by St. Regis Paper Company in connection with the Commission's investigation of the acquisition by the company of the stock or assets, or the stock and assets, of other corporations during the period from January 1, 1954, to date.

It Is Further Ordered that consideration of the request for oral argument be, and it hereby is, deferred pending consideration of the brief and documents submitted pursuant to this order.

It Is Further Ordered that the directions contained in the Commission's orders of January 9, 1959, for the submission within thirty days after the receipt of said orders of the special reports therein described, be, and they hereby are, suspended pending the Commission's decision on the hearing granted by this order.

By the Commission.

/s/ John R. Heim

John R. Heim
Acting Secretary.

Issued: March 5, 1959

[fol. 197]

EXHIBIT 53

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696

In the Matter of

ST. REGIS PAPER COMPANY

ORDER DENYING MOTION TO VACATE

Counsel for St. Regis Paper Company, by motion filed January 22, 1959, having requested the Commission to vacate its resolution of January 6, 1959, and its orders of January 9, 1959, requiring St. Regis Paper Company and certain other corporations to file special reports described in said orders, and the Commission having duly considered the matter and determined for reasons stated in the accompanying memorandum that said motion should be denied:

IT IS ORDERED that the motion be, and it hereby is, denied.

IT IS FURTHER ORDERED that the reports originally required to be filed within thirty days after service of the Commission's orders of January 9, 1959, be filed on or before May 28, 1959.

By the Commission.

(Seal)

/s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

ISSUED: May 6, 1959

[fol. 198]

EXHIBIT 54

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

John W. Gwynne, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 551 0696

In the Matter of

ST. REGIS PAPER COMPANY

MEMORANDUM OPINION RULING ON MOTION TO VACATE

By the Commission:

The Commission on January 6, 1959, adopted a resolution entitled "Resolution Directing Investigation of the Acquisition by St. Regis Paper Company of the Stock or Assets, or Both the Stock and Assets, of Other Corporations." The resolution and orders dated January 9, 1959, requiring the filing by St. Regis Paper Company and other named corporations of special reports, were thereafter served. On January 22, 1959, St. Regis Paper Company filed a motion to vacate the resolution and orders, which motion was denied by the Commission on January 23, 1959. A petition for reconsideration of that action thereafter was filed by St. Regis Paper Company and denied by the Commission on February 11, 1959.

On March 5, 1959, however, the Commission reconsidered its prior actions denying the motion to vacate and the petition for reconsideration; and having determined that St. Regis Paper Company should be accorded a hearing on some of the points made in the motion of January 22,

1959, the Commission vacated the aforementioned orders of January 23, 1959, and February 11, 1959. Leave to file brief in support of the motion to vacate also was granted, with the stipulation that it be limited to contentions that the requirements of the orders requiring special reports [fol. 199] are unreasonable and that to comply with them would be unreasonably burdensome and would result in unreasonable and unnecessary duplication of documents already furnished to the Commission. Pursuant to such leave, St. Regis Paper Company filed brief on March 27, 1959.

Prior to the Commission's adoption of the resolution and issuance of the orders requiring special reports, St. Regis Paper Company had furnished a substantial number of documents to the Commission relating to certain of its acquisitions, which submissions included approximately two hundred documents produced in response to the demands of an investigational subpoena duces tecum duly issuing on September 13, 1957. These and certain additional documents transmitted since issuance of the aforesaid orders are the ones which the brief contends will be unnecessarily and unreasonably duplicated in the event the information and material specified in the orders are required to be furnished. It is noted at the outset that documents stated in the brief as heretofore furnished by St. Regis Paper Company include its annual report for 1957, and certain prospectuses. Item 1(d) of the St. Regis Paper Company order directs it to submit a copy of its annual report for that year and each prospectus issued since January 1, 1958. An instance of duplication respecting material required to be submitted under Item 1(d) and documents heretofore supplied is accordingly acknowledged. However, inasmuch as one of those prospectuses was not submitted until after the orders requiring special reports were issued and duly considering also the comparatively minor number of documents so involved, this instance of duplication obviously does not support conclusions of undue or unreasonable duplication as of now or the time of issuance of the orders for special reports.

Exception is also taken by St. Regis Paper Company to Items 1(a) and (b) directing submission of true copies

of contracts with Growers Container Corporation and F. J. Kress Box Company relating to their respective acquisitions. As noted in the brief, copies of the prospectuses forming part of the printed registration statements filed with the Securities and Exchange Commission in reference to those acquisitions were respectively supplied to the Commission on August 12, 1958, and January 21, 1959. Also [fol. 200] included with the latter submission of material, which occurred after the orders requiring special reports were issued, was a copy of an unexecuted agreement between shareholders of F. J. Kress Box Company and St. Regis Paper Company. It sets forth various understandings of the parties respecting the offer for exchange of stock and identifies certain documentary exhibits as attached thereto. Only one of such exhibits was appended to the document tendered the Commission, however. It accordingly cannot be properly regarded as a true copy of the agreement or duplicative of any of the documents specified under Item 1(b) of the order.

That the various offers for exchange of capital stock attending the various acquisitions in each instance proceeded pursuant to a prospectus forming part of printed registration statements does not indicate, in and of itself, that the requests for copies of contracts and agreements governing those acquisitions are unreasonably or unnecessarily duplicative of the prospectus documents. This holds true even though the prospectuses included information taken from the respective intercorporate contracts or options which were the bases for the resulting exchanges of capital stock. The prospectuses relating to the offers to holders of capital stock of the two corporations named in Items 1(a) and (b) recite that adequacy and accuracy of matters there stated had not been passed on by the Securities and Exchange Commission. The public interest requires that the Commission be assured of securing accurate and complete information concerning the original and basic agreements which inspired and governed each of the parties to the acquisitions.

Some of the prior secured marketing information and other data included in tabulations and annual or other re-

ports originally prepared by St. Regis Paper Company or affiliates for their use or for information of stockholders or official agencies have general relevancy to and bearing on certain of the documents and information requested to be included in the special reports. Although those kindred data and documents perhaps may be utilized by St. Regis Paper Company in compiling complete and accurate special reports, they clearly fall short of supplying the information and material specified under the orders. One of the objectives of the orders is to obtain information which will assist the Commission in delineating the relevant markets for various categories of the paper products produced by [fol. 201] St. Regis Paper Company or the corporations being integrated with it. Movant has made no adequate factual showing that compliance with the orders will result in unnecessary or unreasonable duplication of prior furnished documents. On the contrary, it appears reasonable to conclude that any duplication entailed in complying with the orders will, at most, be relatively minor and insubstantial.

The contentions by St. Regis Paper Company that the requirements of the orders are unreasonable because unauthorized in law and because compliance with them would be unreasonably burdensome also have been considered. The Commission is of the view that its investigation respecting the acquisitions, together with the requirements for special reports, has sound statutory basis. The brief, moreover, contains no showing that the requirements of the orders are otherwise unreasonable and cites no substantive facts indicating that compliance therewith would be unreasonably burdensome. Furthermore, the information required and specified under the orders is necessary for informed administrative determinations respecting the effects, actual or probable, of the acquisitions or mergers in which St. Regis Paper Company has been a participant.

The motion to vacate the Commission's resolution and orders requiring filing of special reports is being denied. Inasmuch as informed decision on the merits of the motion does not require that the matter be argued orally, the request for oral argument likewise is denied. Also denied is

the brief's request that the orders be suspended pending an informal conference respecting items regarded by St. Regis Paper Company as duplicative of documents previously furnished.

Under the order of March 5, 1959, the Commission's orders of January 9, 1959, for the submission within thirty days after the receipt of said orders of the special reports therein described were suspended pending decision on the hearing granted. The order issuing herewith directs that the corporations named in the orders of January 9, 1959, file the special reports there described on or before May 28, 1959.

May 6, 1959

[fol. 202]

EXHIBIT 58

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Earl W. Kintner, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696.

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO POLLOCK PAPER CORPORATION.

WHEREAS, the Federal Trade Commission on January 6, 1959, pursuant to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act

(15 U.S.C., Sec. 46(a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp., 1.1 et seq.), adopted a resolution directing an investigation, for the purposes stated in the resolution, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on January 9, 1959, pursuant to the said resolution, issued its order requiring Pollock Paper Corporation to submit to the Commission within thirty days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolution and the said order requiring the special report were served on Pollock Paper Corporation by registered mail on January 12, 1959; and,

[fol. 203] WHEREAS, the Commission on March 5, 1959, issued, and on March 9, 1959, served on Pollock Paper Corporation by registered mail, its order suspending the directions contained in the Commission's said order requiring the special report pending further consideration of a motion to vacate the said order filed by St. Regis Paper Company on January 22, 1959; and,

WHEREAS, the Commission, on May 6, 1959, issued its opinion and order denying the said motion, and directing that the special report originally required to be filed within thirty days after service of the said order of January 9, 1959, be filed on or before May 28, 1959; and,

WHEREAS, the Commission's said opinion and order of May 6, 1959, were served on Pollock Paper Corporation by registered mail on May 11, 1959; and,

WHEREAS, Pollock Paper Corporation has failed to file the special report required by the said order of January 9, 1959, on or before May 28, 1959, or at any time thereafter prior to the date of this notice of default, and

no additional time having been granted by the Commission for the filing of the said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U.S.C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

[fol. 204] NOW, THEREFORE, you, Pollock Paper Corporation, are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before May 28, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated January 9, 1959.

By the Commission.

(Seal)

/s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

Issued: June 18, 1959

[fol. 205]

EXHIBIT 59

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Earl W. Kintner, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696.

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO F. J. KREBS BOX COMPANY, INC.

WHEREAS, the Federal Trade Commission on January 6, 1959, pursuant to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (15 U.S.C., Sec. 46(a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp., 1.1 et seq.), adopted a resolution directing an investigation, for the purposes stated in the resolution, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on January 9, 1959, pursuant to the said resolution, issued its order requiring F. J. Krebs Box Company, Inc., to submit to the Commission within thirty days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolution and the said order requiring the special report were served on F. J. Kress Box Company, Inc., by registered mail on January 12, 1959; and,

[fol. 206] WHEREAS, the Commission on March 5, 1959, issued, and on March 6, 1959, served on F. J. Kress Box Company, Inc., by registered mail, its order suspending the directions contained in the Commission's said order requiring the special report pending further consideration of a motion to vacate the said order filed by St. Regis Paper Company on January 22, 1959; and,

WHEREAS, the Commission, on May 6, 1959, issued its opinion and order denying the said motion, and directing that the special report originally required to be filed within thirty days after service of the said order of January 9, 1959, be filed on or before May 28, 1959; and,

WHEREAS, the Commission's said opinion and order of May 6, 1959, were served on F. J. Kress Box Company, Inc., by registered mail on May 7, 1959; and,

WHEREAS, F. J. Kress Box Company, Inc., has failed to file the special report required by the said order of January 9, 1959, on or before May 28, 1959, or at any time thereafter prior to the date of this notice of default, and no additional time having been granted by the Commission for the filing of the said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U.S.C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the

corporation has its principal office or in any district in which it shall do business."

[fol. 207] Now, THEREFORE, you, F. J. Kress Box Company, Inc., are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before May 28, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated January 9, 1959.

By the Commission.

(Seal)

/s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

Issued: June 18, 1959

[fol. 208]

EXHIBIT 60

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Earl W. Kintner, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696.

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO GROWERS CONTAINER CORPORATION.

WHEREAS, the Federal Trade Commission on January 6, 1959, pursuant to the authority granted in subsections (a)

and (b) of Section 6 of the Federal Trade Commission Act (15 U.S.C., Sec. 46(a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp., 1.1 et seq.), adopted a resolution directing an investigation, for the purposes stated in the resolution, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on January 9, 1959, pursuant to the said resolution, issued its order requiring Growers Container Corporation to submit to the Commission within thirty days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolution and the said order requiring the special report were served on Growers Container Corporation by registered mail on January 14, 1959; and,

[fol. 209] WHEREAS, the Commission on March 5, 1959, issued, and on March 9, 1959, served on Growers Container Corporation by registered mail, its order suspending the directions contained in the Commission's said order requiring the special report pending further consideration of a motion to vacate the said order filed by St. Regis Paper Company on January 22, 1959; and,

WHEREAS, the Commission on May 6, 1959, issued its opinion and order denying the said motion, and directing that the special report originally required to be filed within thirty days after service of the said order of January 9, 1959, be filed on or before May 28, 1959; and,

WHEREAS, the Commission's said opinion and order of May 6, 1959, were served on Growers Container Corporation by registered mail on May 11, 1959; and,

WHEREAS, Growers Container Corporation has failed to file the special report required by the said order of January 9, 1959, on or before May 28, 1959, or at any time

thereafter prior to the date of this notice of default, and no additional time having been granted by the Commission for the filing of the said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U.S.C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

[fol. 210] NOW, THEREFORE, you, Growers Container Corporation, are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before May 28, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated January 9, 1959.

By the Commission.

(Seal)

/s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

Issued: June 18, 1959

[fol. 211]

EXHIBIT 61

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Earl W. Kintner, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696.

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO RHINELANDER PAPER COMPANY.

WHEREAS, the Federal Trade Commission on January 6, 1959, pursuant to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (15 U.S.C., Sec. 46(a)(b)) and its published procedures and rules of practice (16 CFR, 1958 Supp., 1.1 et seq.), adopted a resolution directing an investigation, for the purposes stated in the resolution, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on January 9, 1959, pursuant to the said resolution, issued its order requiring Rhinelander Paper Company to submit to the Commission within

thirty days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolution and the said order requiring the special report were served on Rhinelander Paper Company by registered mail on January 12, 1959; and,

[fol. 212] WHEREAS, the Commission on March 5, 1959, issued, and on March 9, 1959, served on Rhinelander Paper Company by registered mail, its order suspending the directions contained in the Commission's said order requiring the special report pending further consideration of a motion to vacate the said order filed by St. Regis Paper Company on January 22, 1959; and,

WHEREAS, the Commission, on May 6, 1959, issued its opinion and order denying the said motion, and directing that the special report originally required to be filed within thirty days after service of the said order of January 9, 1959, be filed on or before May 28, 1959; and,

WHEREAS, the Commission's said opinion and order of May 6, 1959, were served on Rhinelander Paper Company by registered mail on May 11, 1959; and,

WHEREAS, Rhinelander Paper Company has failed to file the special report required by the said order of January 9, 1959, on or before May 28, 1959, or at any time thereafter prior to the date of this notice of default, and no additional time having been granted by the Commission for the filing of the said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U.S.C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of

the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

[fol. 213] Now, THEREFORE, you, Rhinelander Paper Company, are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before May 28, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated January 9, 1959.

By the Commission.

(Seal)

/s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

Issued: June 18, 1959

[fol. 214]

EXHIBIT 62

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Earl W. Kintner, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696.

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO PACIFIC WAXED PAPER COMPANY.

WHEREAS, the Federal Trade Commission on January 6, 1959, pursuant to the authority granted in subsections (a)

and (b) of Section 6 of the Federal Trade Commission Act (15 U.S.C., Sec. 46(a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp., 1.1 et seq.), adopted a resolution directing an investigation, for the purposes stated in the resolution, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on January 9, 1959, pursuant to the said resolution, issued its order requiring Pacific Waxed Paper Company to submit to the Commission within thirty days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolution and the said order requiring the special report were served on Pacific Waxed Paper Company by registered mail on January 13, 1959; and,

[fol. 215] WHEREAS, the Commission on March 5, 1959, issued, and on or about March 9, 1959, served on Pacific Waxed Paper Company by registered mail, its order suspending the directions contained in the Commission's said order requiring the special report pending further consideration of a motion to vacate the said order filed by St. Regis Paper Company on January 22, 1959; and,

WHEREAS, the Commission, on May 6, 1959, issued its opinion and order denying the said motion, and directing that the special report originally required to be filed within thirty days after service of the said order of January 9, 1959, be filed on or before May 28, 1959; and,

WHEREAS, the Commission's said opinion and order of May 6, 1959, were served on Pacific Waxed Paper Company by registered mail on May 11, 1959; and,

WHEREAS, Pacific Waxed Paper Company has failed to file the special report required by the said order of January 9, 1959, on or before May 28, 1959, or at any time

thereafter prior to the date of this notice of default, and no additional time having been granted by the Commission for the filing of the said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U.S.C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

[fol. 216] NOW, THEREFORE, you, Pacific Waxed Paper Company, are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before May 28, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated January 9, 1959.

By the Commission.

(Seal)

/s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

Issued: June 18, 1959

[fol. 217]

EXHIBIT 63

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Earl W. Kintner, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696.

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO CUPPLES-HESSE CORPORATION.

WHEREAS, the Federal Trade Commission on January 6, 1959, and on June 4, 1959, pursuant to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (15 U.S.C., Sec. 46(a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp., 1.1 et seq.), adopted resolutions directing an investigation, for the purposes stated in the resolutions, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on June 8, 1959, pursuant to the said resolutions, issued its order requiring Cupples-Hesse Corporation to submit to the Commission within

thirty days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolutions and the said order requiring the special report were served on Cupples-Hesse Corporation by registered mail on June 10, 1959; and,

WHEREAS, Cupples-Hesse Corporation has failed to file the special report required by the said order of June 8, 1959, on or before July 10, 1959, or at any time thereafter [fol. 218] prior to the date of this notice of default, and no additional time having been granted by the Commission for the filing of said special report; and,

WHEREAS, Section 10 of the Federal Trade Commission Act (15 U.S.C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

NOW, THEREFORE, you, Cupples-Hesse Corporation, are hereby notified as provided in Section 10 of the Federal Trade Commission Act that you are in default in having failed to file on or before July 10, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated June 8, 1959.

By the Commission.

(Seal) /s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

Issued: July 22, 1959.

[fol. 219]

EXHIBIT 64

UNITED STATES OF AMERICA

BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Earl W. Kintner, Chairman
Robert T. Secrest
Sigurd Anderson
William C. Kern
Edward T. Tait

File No. 5510696.

In the Matter of

ST. REGIS PAPER COMPANY, et al.

NOTICE OF DEFAULT TO NORTHWEST DOOR COMPANY

WHEREAS, the Federal Trade Commission on January 6, 1959, and on June 4, 1959, pursuant to the authority granted in subsections (a) and (b) of Section 6 of the Federal Trade Commission Act (15 U.S.C., Sec. 46(a)(b)) and to its published procedures and rules of practice (16 CFR, 1958 Supp., 1.1 et seq.), adopted resolutions directing an investigation, for the purposes stated in the resolutions, of the organization, business, conduct, practices, and management of St. Regis Paper Company, a corporation, and of the corporations whose stock or assets, or both stock and assets, have been acquired by St. Regis Paper Company on or after January 1, 1954, and the relation of St. Regis Paper Company and the acquired corporations to each other and to other corporations; and,

WHEREAS, the Commission on June 8, 1959, pursuant to the said resolutions, issued its order requiring Northwest Door Company to submit to the Commission within thirty

days a special report containing the information and documents specified in the order; and,

WHEREAS, the said resolutions and the said order requiring the special report were served on Northwest Door Company by registered mail on June 12, 1959; and,

WHEREAS, Northwest Door Company has failed to file the special report required by the said order of June 8, 1959, on or before July 12, 1959, or at any time thereafter prior to the date of this notice of default, and no additional time having been granted by the Commission for the filing of said special report; and,

[fol. 220] WHEREAS, Section 10 of the Federal Trade Commission Act (15 U.S.C., Sec. 50) provides in part as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the Commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business."

NOW, THEREFORE, you, Northwest Door Company, are hereby notified, as provided in Section 10 of the Federal Trade Commission Act, that you are in default in having failed to file on or before July 12, 1959, or at any time thereafter, the special report containing the information and documents required by the said order of the Federal Trade Commission dated June 8, 1959.

By the Commission.

(Seal) /s/ ROBERT M. PARRISH

Robert M. Parrish,
Secretary.

Issued: July 22, 1959.

[fol. 221]

EXHIBIT 86

June 8, 1959

Robert M. Parrish, Esq., Secretary
Federal Trade Commission
Washington 25, D. C.

Re: In the Matter of St. Regis Paper Company—File No. 5510696

Dear Sir:

This acknowledges the receipt of a copy of the order of the Commission issued June 1, 1959.

In the third paragraph of the order we note that the Commission has granted permission for counsel for the petitioner to inspect documentary material previously furnished to the Commission.

[fol. 222] We respectfully direct your attention to the provisions of subdivision (d) of our client's petition dated May 20, 1959 (filed May 22, 1959), which reads as follows:

> "(d) That the Commission make available for inspection by counsel for petitioner and inclusion as a part of the proper record of the proceedings in this matter either all of the specific documents, records, reports and other information heretofore voluntarily furnished the Commission and its representatives by petitioner in connection with the Commission's investigation of the acquisition by petitioner of the stocks or assets or stocks and assets of other corporations during the period from 1954 to date, or proper summaries thereof."

Since it may be necessary to have the determination of the Commission reviewed in the courts, it is respectfully suggested that the Commission cause to be prepared an adequate list of all of the specific records, documents, copies of minutes and all other records and information previously furnished to the Commission by petitioner so

that each of such records and documents may be specifically identified and referred to in connection with a court review of the Commission's proceedings.

In connection with the foregoing, if the Commission so desires, and will fix the date, hour and place for the examination and inspection of all such documentary material for the purposes stated above, we shall be pleased to have a representative of counsel for the petitioner attend at such time and place with a representative of the Commission's counsel, to the end that the Commission's counsel and petitioner's counsel may reach an agreement regarding the documentary material previously furnished. [fol. 223] In regard to the furnishing of any additional information to the Commission, particularly as ordered by special reports under Section 6 of the Federal Trade Commission Act, we believe it has been made clear to the Commission that it is the position of the petitioner, St. Regis, that the Commission has no power under Section 6 of the Federal Trade Commission Act to require the filing of such special reports for the purposes previously stated by the Commission and that any additional documents or information which the Commission may require will be furnished only on a voluntary basis, which is the same basis on which all previous material has been furnished the Commission in connection with its investigation of our client's acquisition of the stocks or assets or stocks and assets of other corporations for the purpose of enabling the Commission to determine whether any of our client's acquisitions may be in violation of Section 7 of the Clayton Act.

We also repeat the offer previously made to the Commission and the members of its staff to meet with representatives of the Commission to discuss any phase of the Commission's investigation and the numerous documents, records and information previously furnished to assist the Commission in the completion of its investigation.

Respectfully yours,

HORACE R. LAMB

[fol. 224]

EXHIBIT 110

LAW OFFICES OF

LEBOEUF, LAMB & LEIBY
15 BROAD STREET
NEW YORK 5, N. Y.

RANDALL J. LEBOEUF, JR.
HORACE R. LAMB
ADRIAN S. LEIBY
CAMERON F. MAC RAE
CHAUNCEY P. WILLIAMS, JR.
JOHN A. BROUGH
CRAIGH LEONARD
JAMES O'MALLEY, JR.
JOHN L. GROSE
HALCYON G. SKINNER
WILLIAM R. SHERWOOD

ARVIN E. UPTON
1821 JEFFERSON PLACE, N. W.
WASHINGTON 6, D. C.

[Stamp—Federal Trade Commission—Received—SEP 1 1959 *Wm. McCauley*—Secretary.]

August 31, 1959

John R. Heim, Esq.,
Acting Secretary
Federal Trade Commission
Washington 25, D. C.

Re: St. Regis Paper Company
File No. 5510696

Dear Mr. Heim:

This acknowledges your letter of August 21st, in which you state that my letter of August 18th has been received and "has been called to the attention of the Commission". It is also noted, with regret, that the Commission does not find satisfactory my offer to make available to the Commission's authorized representative the documents and in-

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Italicized material denotes handwritten notation.

formation as offered in my letter of August 18th, and that "nothing short" of the written reports as directed by the Commission "will be satisfactory".

Your statement appears to warrant the conclusion that the Commission is more interested in form than substance; that the Commission finds greater satisfaction in forcing our client into an acceptance of a challenged legal power of the Commission under Section 6(b) of the Federal Trade Commission Act than in ascertaining by personal interview and inspection the additional facts relating to our client's acquisitions of the stocks and assets of other corporations, and that, in the actual conduct of an investigation of a stock acquisition to determine whether Section 7 of the Clayton Act has any application, the Commission's course is other than as described in the Commission's 1958 Report to Congress (pages 22, 23 and 24; see also pages 9 and 10).

In the third paragraph of your letter you write that the Commission "also notes" my repeated request "for a conference respecting this matter". Your letter then attempts to state, quite inadequately, the prior history of the Commission's investigation of our client's acquisitions, which began with a letter dated September 7, 1956.

Whoever drafted that portion of your letter of August 21st, we submit, has not made an accurate statement in [fol. 225] saying that a "major portion of the information and documents have not been forthcoming short of compulsory process".

The true facts are that the Commission has never resorted to any "compulsory process" and has not applied to any court to enforce a subpoena duces tecum issued by the Commission. The Commission did issue a subpoena listing certain documents which should not have been requested and which was otherwise unreasonable and improper in its scope. The subpoena was returnable before Mr. Seidman, an attorney for the Commission in charge of the Commission's New York office. In informal personal conferences and discussions with Mr. Seidman, it was possible to reach agreement regarding the voluminous documents and records of our client to be voluntarily furnished.

At the conclusion of the so-called "hearing" on the subpoena before Mr. Seidman, on the stenographic record Mr. Seidman noted that all of the documents and records in the control of St. Regis having been furnished, the "hearing" was concluded, and Mr. Crawford, Secretary of the corporation was discharged from further response to the subpoena.

Some time subsequent to the conclusion of the matter before Mr. Seidman, the Commission determined to investigate the "combined effect" of our client's acquisitions, and in that connection has requested, and subsequently purported to order, special reports under Section 6(b) to secure additional information, documents and records from our client.

It is also true that, on behalf of our client, we have protested and objected to the Commission's authority to compel written reports from our client under Section 6(b) of the Federal Trade Commission Act to determine whether the "combined effect" of our client's acquisitions presented any question under Section 7 of the Clayton Act.

You further state that the Commission "takes a different view" and that in such circumstances the Commission feels that a further conference would serve no useful purpose. This is, of course, most regrettable.

I firmly believe it would serve a most useful purpose to discuss this matter with a responsible representative of the [fol. 226] Commission. I have suggested the Chairman, any member of the Commission or its General Counsel.

If the Commission is not willing to grant an opportunity for a conference, is it not still in order to request that the Commission or its authorized representative make specific answers to the several questions which we have presented in our previous letters?

Is it fair treatment on the part of the Commission to avoid either a conference with the Commission's representative or counsel or a submission to the Attorney General of the United States of the legal question regarding the Commission's power to require reports under Section 6(b) of the Federal Trade Commission Act as a means of investigating whether Section 7 of the Clayton Act has been violated?

It has been noted that Mr. Daniel J. McCauley, Jr. has recently been appointed the new General Counsel of the Commission, and I respectfully request that a copy of this letter and of the Commission's entire file in this matter, including all of our letters, motions and applications designed to raise the question of the proper interpretation of Section 6(b) of the Federal Trade Commission Act, be brought to the attention of Mr. McCauley, and that our request for a conference to discuss this whole matter be submitted to Mr. McCauley.

It is respectfully submitted that fair dealing on the part of the Commission requires that we be granted the opportunity for such conference. The conclusory statement in your letter of August 21st that "a further conference would serve no useful purpose" is, we believe, unwarranted.

We particularly desire to discuss with Mr. McCauley whether he would be willing that we attend at any conference with the Attorney General, or at least present a written memorandum of our views, if the Commission determines to request that a suit on behalf of the United States be brought against our client to collect any penalties claimed to be due from our client for alleged default in furnishing the special reports pursuant to Section 6(b) of the Federal Trade Commission Act, as requested.

[fol. 227] Another question which we would like to discuss with the General Counsel, assuming that the Commission is not eager to request the Attorney General to commence a suit against our client, as mentioned above, and having in mind that such suit would have to be brought in the United States District Court for the Southern District of New York where our client has its principal office, is whether the members of the Commission would be willing to submit to the jurisdiction of that Court in a suit instituted by our client against the Commission for declatory judgment and injunctive relief for the purpose of having the legal question of the Commission's power under Section 6(b) judicially determined without further delay?

In view of the continued insistence by the Commission of its legal right to require written special reports from our

client pursuant to Section 6(b) of the Federal Trade Commission Act for the purpose stated above, and the giving by the Commission to our client of a purported "notice of default" in furnishing such reports within a thirty day period (which may have expired), we believe it proper to request that the above questions be taken up with the Commission's General Counsel.

We would make the request directly to the General Counsel, except for the provision of the Commission's rule (Sec. 1.4) which requires that all communications be addressed to the Commission, unless otherwise specifically directed.

We are therefore enclosing an additional copy of this letter in order that it may be submitted to Mr. McCauley.

Respectfully yours,

/s/ HORACE R. LAMB

Enclosure

[fol. 228]

EXHIBIT 111

FEDERAL TRADE COMMISSION

WASHINGTON 25

BUREAU OF INVESTIGATION
OFFICE OF
CHIEF PROJECT ATTORNEY

September 1, 1959.

Douglas W. Hawes, Esq.,
LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York.

Dear Mr. Hawes:

At your request and for your use in your inspection of the Commission's files containing documents furnished the Commission by or on behalf of St. Regis Paper Company, I have today provided you with a copy of the list of the documents so furnished. You will note that the list

contains a brief description of each of the documents. This description was prepared for use of the Commission's staff in identifying the documents and may or may not accurately describe each of the documents.

Sincerely yours,

/s/ FRANK C. HALE

Frank C. Hale,
Legal Adviser.

[fol. 229]

EXHIBIT 112

September 2, 1959

Frank C. Hale, Esq.
Bureau of Investigation
Federal Trade Commission
Washington 25, D. C.

Dear Mr. Hale:

Let me take this opportunity to thank you for permitting me to inspect the Commission's files and for furnishing me with a copy of the list of documents contained therein.

As previously indicated, such list will be regarded as merely descriptive and in no way binding on the Commission or on St. Regis Paper Company.

Very truly yours,

Douglas W. Hawes

DWH:cm

[fol. 230]

EXHIBIT 113

FEDERAL TRADE COMMISSION
WASHINGTON 25

OFFICE OF THE GENERAL COUNSEL

SEP 4 1959

Horace R. Lamb, Esq.,
LeBoeuf, Lamb & Leiby,
15 Broad Street,
New York 5, New York.

Re: St. Regis Paper Company,
File No. 5510696.

Dear Mr. Lamb:

Your letter of August 31, 1959, to the Commission's Acting Secretary has been referred to this office for reply.

From our review of this file it appears that the only inquiry contained in your letter which has not been the subject of prior correspondence with the Commission is your question as to "whether the members of the Commission would be willing to submit to the jurisdiction" of the United States District Court for the Southern District of New York in a suit by your client for a declaratory judgment and injunctive relief.

In the event such suit should be filed, you are advised that we would be compelled to note the probable lack of jurisdiction in the Court upon the authority of *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160 (1927). See also *Federal Trade Commission* v. *Maynard Coal Co.*, 22 F.2d 873 (C.A.D.C., 1927).

Your request for a conference has been noted. In view of the position you have taken throughout the Commission's investigation, I am very doubtful that further discussion will be fruitful. If, however, you feel that a conference may

lead to your client's compliance with the Commission's orders requiring reports, I shall be glad to confer with you here, if agreeable to you, during the afternoon of September 11th.

Very truly yours,

/s/ DANIEL J. MCCAULEY, JR.

Daniel J. McCauley, Jr.,
General Counsel.

[fol. 231]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM TRANSCRIPT OF TESTIMONY—
January 25 and 26, 1960

• • • • • • •

The Court: So what you are doing to me now is presenting to me a test case then?

Mr. Suglia: Yes, we are presenting a test case.

The Court: As to whether or not an order can properly issue under Section 6(b) for the purpose of conducting or aiding in an investigation as to whether or not the Clayton Act has been violated.

(Mr. Suglia nods.)

The Court: Is that right?

Mr. Suglia: That is correct, your Honor.

• • • • • • •

Mr. Suglia: It is not for that purpose that the citation of the Morton case is given to your Honor, but rather for the exceedingly descriptive language therein, considering now that we are possibly addressing ourselves to the first question of 6(b), pre-complaint in a Section 7 Clayton Act proceeding; and in the language of the case we find—and I am reading from the quotation in our brief, and I quote:

> "We find nothing that would deny its use (the use of Section 6(b)) for any purpose within the duties of the Commission."

And then going on to say:

> "Including a 5 proceeding," being in that instance a Section 5 proceeding of the Federal Trade Commission.

But it would seem that this is a clear enunciation of the Court's opinion with respect to the use of the Section 6 (b) power, and in view of the Court here today being faced with this problem on a basis of first impression, I believe that this language might well indicate to the Court or assist the Court in its search for the solution to this legal proposition.

* * * * * * * *

[fol. 232] "Mr. Lamb: * * * the Commission has deemed the order for special reports as an order to be considered in its entirety. It required us to comply with it in its entirety. It refused any consideration or modification of any part of those orders.

"Now that's the basis upon which the plaintiff, the United States, at the request of the Commission has instituted this suit.

"Now therefore if there is any part of the order requiring us to file these special reports that is improper then we submit the whole must fall, and I can submit to your Honor there are many parts that are improper."

* * * * * * * *

[fol. 233] The Court: Suppose I were to adopt your view when you say, "Well, I hold that the Commission has authority"—not your view in that, but suppose I were to hold that the Commission had authority to issue an order requiring a report, but the order that they issued required more than a report; therefore their complaint must be dismissed.

(Mr. Lamb nods.)

The Court: Now would that mean? It would mean then that the Commission would have to proceed to issue another order. It would again delay matters. You would then on that second order have the right to administra-

tive review. If you were denied that, there would be another suit brought here.

Now doesn't common sense and efficient Government management dictate that if this order can be sustained in part it should be sustained in part with an opportunity given to your client to comply with such part as is valid, rather than to compel the Commission to come back and issue another order and again delay the process of their work?

• • • • • • •

[fol. 234] Mr. Suglia: Now, finally, your Honor, there is the question as to whether or not you could modify this order or otherwise. It is not our position here that you can or cannot modify the order. It is our position here that you can enforce this order in such manner as equity would dictate.

I believe this is as a practical matter an equitable proceeding, so that we feel that you are not limited, your Honor, by the modification principle of the order, but rather only by what you consider to be equitably the enforcement of that portion or those portions of this order which are reasonable, not oppressive, which are relevant and which have not been previously answered by materials either voluntarily submitted or submitted under the compulsion of the subpoena.

• • • • • • •

[fol. 235]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, New York City, for plaintiff (William F. Suglia, Esq., Assistant U. S. Attorney, New York City; Daniel J. McCauley, Jr., Alan B. Hobbes, J. B. Truly, Esqs., Federal Trade Commission, Washington, D. C., of counsel.)

LeBouef, Lamb & Leiby, Esqs., New York City, for defendant (Horace R. Lamb, H. Richard Wachtel, Douglas W. Hawes, Esqs., New York City, of counsel).

OPINION—Entered April 21, 1960

Ryan, Chief Judge:

This suit arises under Sections 9 and 10 of the Federal Trade Commission Act. (15 USCA 49 and 50) Section 9 vests the District Court with jurisdiction to issue orders in the nature of mandamus commanding any person or corporation to comply with any order of the Commission made in pursuance of the Act. Section 10 gives any District Court of the United States, in which a corporation has its principal office or is doing business, jurisdiction of suits by the United States for the recovery of forfeitures, if the corporation shall fail to file any special report required by the Act within the time fixed for filing same and such failure shall continue for 30 days after notice of such default.

Defendant, St. Regis Paper Company, a New York corporation with its principal place of business in this District, was made the subject of a Federal Trade Commission resolution, dated January 6, 1959, which directed an in- [fol. 236] vestigation of the organization, business, conduct, practices and management of the defendant for the purpose of uncovering possible violations of Section 7 of the Clayton Act, as amended (15 USCA 18). Pursuant to this resolution and Section 6(a) and (b) of the F. T. C. Act (15 USCA 46(a) and (b)), the Commission issued orders to each of six corporations,[1] including defendant, requiring each to file a Special Report, containing specified data and documents, with the Commission, within 30 days after service of the order. The orders, with a copy of the January 6th resolution, were served according to statute. Since each of the other corporations served is wholly owned by defendant and since defendant was in possession of all the data and documents required, defendant was responsible for complying with the notice to file for all corporations served.

Defendant moved, before the Commission, to vacate the orders and for other appropriate relief. After first deny-

[1] The Corporations served, beside defendant, were Growers Container Corp., I. J. Kress Box Co., Inc., Pacific Waxed Paper Co., Pollock Paper Corp. and Rhinelander Paper Co.

ing this motion, the Commission, on March 5, 1959, permitted defendant to file a brief in opposition to their issuance. After consideration of the matter, the Commission denied the motion on May 6, 1959, and later denied defendant's motion for reconsideration.

On June 4, 1959, the Commission adopted a second resolution in which it asserted that it was "in the public interest to broaden its investigation" and on June 8, 1959, the Commission issued orders to defendant, Cupples-Hess Corp. and Northwest Door Co. requiring the filing of Special Reports. Since the latter two corporations were wholly [fol. 237] owned by defendant, it was again responsible for the filing of all reports. Some of the information ordered to be furnished has been filed but the Commission alleges that this was not sufficient and St. Regis refused to comply further.

Under the compulsion of the last three orders and under subpoena issued at an earlier date and not relevant here, defendant has supplied a large volume of data and documents. The Commission has supplied the Court with a stipulation of deficiency, which lists the items required by the order which, it is alleged, have not been supplied. Documentary evidence and stipulated facts were received by the Court at a trial without a jury, which was concluded on January 26, 1960.

In sum then, we are asked to enforce nine orders requiring Special Reports and to levy forfeitures of $100 a day, under Section 10 of the F. T. C. Act, on defendant corporation for the delay in complying with each of the two orders addressed to it personally. The forfeiture on the January 9, 1959, order is claimed to have run from July 20, 1959 and the forfeiture on the June 8, 1959 order is claimed to have run from August 23, 1959.

The purpose of the Commission's order was to determine whether the defendant, by its acquisitions of the stock or assets of other corporations, had violated Section 7 of the Clayton Act which prohibits the acquiring, in whole or in part, of the stock or assets of "one or more corporations engaged in commerce . . . where . . . the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly."

This is the first time a Section 6(b) order has ever been used by the Commission prior to the filing of a complaint. It is said that the use of the process of 6(b) has never before been necessary because of voluntary disclosures. [fol. 238] Since 1950 over 400 alleged violations of Section 7 have been investigated and because of the full or substantial compliance with the requests of the Commission on a voluntary basis, there has never been a need for the use of either an order under Section 6(b) or a subpoena under Section 9 of the F. T. C. Act. In the continuing investigation of defendant, however, the Commission has felt it necessary to use both types of process.

Defendant's principal contention is that the Commission has acted beyond its statutory power in the issuance of a 6(b) order in the circumstances of this case. It is claimed that 1) 6(b) was never intended to be used in the investigation of an alleged antitrust violation and 2) that, in any event, the special report was never meant to be used in a pre-complaint investigation and was never meant to elicit the detailed information required by the orders in suit. We cannot agree with either of defendant's contentions.

Section 6(b) is written in the broadest possible terms. We can find no words of limitation whatsoever and hold that 6(b) is not limited and can be used in antitrust investigations. The Commission concededly has power and certain duties in the antitrust field, including the investigation of alleged Section 7 violations, and we find nothing that would deny the use of the power conferred by Section 6(b) for any purpose within the scope of those duties. In fact, the Supreme Court has "found a good deal which would warrant our concluding that Section 6 was framed with the pre-existing anti-trust laws in mind." *United States* v. *Morton Salt Co.*, 338 U. S. 632, 649 (1950).

In its argument concerning the intention of the enacting Congress and the kind of reports contemplated, defendant [fol. 239] relies heavily on the legislative history of the Federal Trade Commission Act of 1914. Although making a very plausible and well documented argument, defendant overlooks the fact that the United States Supreme Court has already reviewed this legislative history and rejected almost the same argument.

In *United States* v. *Morton Salt Co., supra,* the Commission used a 6(b) order to require a compliance report under a cease and desist order. Morton Salt Co. argued that the legislative history of Section 6(b) showed that it was only intended to be used in requiring statistical and financial reports as had earlier been filed with the Bureau of Corporations. The Supreme Court rejected this interpretation. Defendant in the present case uses the same history to argue the same point although adding, in deference to the Morton Salt decision, compliance reports to the area of proper subject matter under 6(b). However, the words of the Supreme Court are much broader. It was held that 6(b) could be used in furtherance of any duty which the Act empowered the Commission to perform. The Act is "to be read as an integral whole" and 6(b) is just another broad grant of investigative power to be used as an alternative to the subpoena power of Section 9. We are bound by this liberal interpretation found in Morton Salt and cannot limit its holding to the narrow confines urged by defendant.

Simply because the Commission has not seen fit to use the 6(b) order previously in no way destroys or inhibits its power to do so for powers, if granted, are not lost by being allowed to lie dormant and the Supreme Court, in *Morton Salt,* said that this power granted to the Federal Trade Commission has not been forfeited by non-use.

[fol. 240] Defendant also argues that the Federal Trade Commission Act contains no provision for the judicial review of 6(b) orders and that defendant's only course is to incur the forfeitures and wait for the Commission to proceed in the District Court for the collection of the money. It is alleged that this violates due process. This argument has no merit. Mr. Justice Jackson suggested in *Morton Salt,* although the question was not before him for decision, that either the Declaratory Judgment Act or the Administrative Procedure Act might be used by a defendant to initiate judicial review of a 6(b) order. We feel that the Administrative Procedure Act (5 USCA 1009) supplied adequate review for an order of the type before us.

We therefore hold that the orders validly issued and proceed to a study of the subject matter of the orders themselves.

Defendant argues that the Commission has no right to copies of census reports and customers lists since these documents are privileged. We find no basis in law for sustaining this position. In fact, as to census reports, a summary glance at the cases cited by defendant reveals they do not hold or even remotely allude to the position St. Regis advocates. We believe that the analogy to income tax returns (original returns are privileged, copies in the hands of the taxpayers are not) used in *United States* v. *Continental Can Company* (Civil Action No. 112-387, See transcript page 67) is sound for our purpose and we hold that the copies are not privileged and should be supplied. [fol. 241] Defendant's motion to vacate the orders, its submission of briefs at the time the motion to vacate was heard by the Commission and its efforts to secure oral argument constituted not only an attempt to quash the orders entirely but also an attempt to modify the orders as issued. Therefore, we have in this suit "reasonable efforts before the Commission itself to obtain reasonable conditions", *United States* v. *Morton Salt*, *supra*, p. 653, which will enable the Court to consider the question of arbitrary excessiveness. The Supreme Court has supplied us with the test to be applied. The reports must relate to (1) an inquiry within the authority of the agency; (2) the demand must not be too indefinite; and (3) the information sought must be reasonably relevant. We hold that the Commission has the authority and that the information sought is relevant. We question, however, the definiteness of the demands.

Requests for information, contained in subpoenas or 6(b) orders, which require compliance under threat of penalties or forfeitures, must be drawn with certainty. When one is subject to a penalty or forfeiture for refusing to answer, what is demanded must be so crystal clear as to leave no room for confusion. This is a basic tenet of criminal law (statutory clarity as to what is forbidden or what is proscribed before punishment or penalty can be imposed) and we feel it is equally valid in the field of civil process which seeks to apply a penalty or enforce a forfeiture. (Cf. *Jordan* v. *DeGeorge*, 341 U. S. 223 (1951); *United States* v. *Ryan*, 128 F. Supp. 128, 350 U. S. 299).

Certainly the forfeiture of $100 a day for each order, present in this case, is sufficiently analogous to a criminal sanction. A reading of these orders reveals over two dozen [fol. 242] instances of vague and uncertain questions to which anyone would have trouble giving a definitive answer. A few examples will suffice to emphasize our point.

In the first order addressed to St. Regis, the Commission asks defendant to "describe any changes in the character and scope of Superior's operations since St. Regis acquired control of the company." We feel this is not a definitive question! What operations are the Federal Trade Commission interested in? Sales? Productions? Promotion? Personnel?

In the same order, the Commission asks for "all statistical summaries or reports prepared by a trade association, individual or firm" based on types of data mentioned earlier in the order. We think that this is too broad and indefinite to permit compliance and feel that this type of information may not even be within the knowledge of St. Regis.

In the second order to St. Regis (June 8, 1959), the Commission requires St. Regis to "Explain how the business and productive facilities of Northwest Door and Cupples-Hesse Corp. would be fitted into the operations of your company." This question speaks for itself.

These questions proceed upon the assumption that the Commission may require a defendant to investigate itself. We hold that it may not.

If the Commission is going to make use of this 6(b) process, it must realize from the outset that the utmost care in preparing these orders is a necessity. The character of the process itself requires that certain limits be placed upon the content of the orders to protect those to whom the orders are directed.

[fol. 243] When requiring statistical information under 6(b) orders, the Commission must be content with those statistics which are kept in the regular course of business or are readily available. Questions seeking opinions or delving into the subjective motives of third persons, examples of both appearing in the orders in suit, are no more proper under a 6(b) order than under the Section 9 subpoena.

We feel that Section 6(b), as read in conjunction with the whole act and in particular with Section 9, was designed as a means of convenience to both the business community and the Commission. This report procedure is an aid to the busy executive in that he is not required to spend his time away from his administrative and executive duties while attending hearings in person. We do not, however, think this report was designed to replace the searching examination which might be conducted if the executive were to attend in person under subpoena, especially in this case where defendant is required not only to answer to this searching examination but to interpret the purpose and meaning of the questions as well.

The orders in suit might have been drafted with more attention to the details and specifications of information sought. The path of least resistance should not be followed when drawing questions to be answered under compulsion of process. It should not be left to a busy, overburdened and undermanned Court to interpret and edit these demands. We have neither the staff nor the time to assume this burden.

Defendant urges that having found portions of the orders indefinite, we must strike down the entire set. From a [fol. 244] practical point of view, this seems silly since it would require the Commission to redraw and reissue the same orders. We believe that ordering partial compliance is a more practical method of dealing with these orders and feel that Section 6(c) of the Administrative Procedure Act, 5 USCA 1005(c), affords us ample legal authority to modify these orders. (Cf. *N. L. R. B.* v. *Anchor Rome Mills*, 197 F. 2nd 447; *F. C. C.* v. *Cohn*, 154 F. Supp. 899.)

In addition to the questions which we hold do not pass the test laid down by the Supreme Court, plaintiff admits that the orders in question also require information which has already been supplied. We need not decide whether this alone would have justified non-compliance, but make mention of it only because of the confusion which the issue caused.

The Commission's specification of default has been rigorously challenged by defendant. St. Regis in its answer to the specification takes great pains to point out the vast

amount of information it has supplied for which the Commission gives no credit. After reading the answer, we saw merit in defendant's contention and found it necessary to go over the entire situation and come to our own conclusions as to what was answered by defendant, making use of the material supplied by St. Regis in its answer.

We therefore order compliance with those portions of the orders which are enforceable and have not been answered. For the sake of clarity we will first list those questions which we find so indefinite as to be unenforceable and then, since it appears the shorter task, list all questions which are to be answered.

[fol. 245] Unenforceable Questions

Order #1—St. Regis—1h, 3j, 3k, 5j, 5k, 6j, 7j, 8j, 11.

Order #2—Growers Container—3c, 7, 8.

Order #3—Kress Box—3c, 7, 8.

Order #4—Pacific Waxed Paper—3c, 6, 7.

Order #5—Pollock Paper—3c, 6, 7.

Order #6—Rhinelander Paper—3c, 6.

Order #7—St. Regis—5.

Order #8—Cupples-Hesse—3c, 7.

Order #9—Northwest Door—3c, 7.

Questions to Be Answered

Order #1—1c, 1e, 1f, 1g, 1i; 2a, 2c; 3b, 3d, 3f, 3h(2), 3i; 5a, 5b, 5c, 5f, 5h, 5i; 6a, 6b, 6c, 6d, 6e, 6f, 6h, 6i; 7a through 7h; 8a, 8b, 8d, 8e(1), 8e(3), 8f, 8h, 8i; 9b; 10b.

Order #2—2b, 2d; 3a, 3b, 3d; 4b, 4c, 4d; 5b; 6a, 6b, 6c.

Order #3—2b, 2d; 3a, 3b, 3d; 5c, 5d, 5e; 6c(3).

Order #4—2b; 3a, 3b, 3d; 4a, 4b, 4c, 4d, 4e, 4f; 5b, 5c.

Order #5—2b, 2e; 3a, 3b, 3d; 4b(2), 4c, 4e; 5a, 5b, 5c, 5d. 5f.

Order #6—2b, 2c, 2d, 2e; 3a, 3b, 3d; 4b(2), 4c.

Order #7—1a, 1c; 2a, 2b; 3a, 3b, 3c; 4a, 4b.

Order #8—2b; 3a, 3b, 3d; 4b; 5b(4), 5b(5); 6a, 6b.

Order #9—1; 2a, 2b, 2c, 2d; 3a, 3b, 3d; 4a, 4c; 5a, 5b; 6.

[fol. 246] The Government also seeks a statutory forfeiture of $100 a day for each of two orders addressed personally to St. Regis Paper Co.

All nine orders were issued during a short period of time. (The January 6, 1959 orders were subject to motions to vacate until May 6, 1959.) They all related to the same investigation. In fact, the second order (June 8, 1959) recites that it is issued to "broaden its investigation" of defendant. In the final analysis, defendant was required to supply all the information. We feel that all of the orders requested information which made up one special report and what was being investigated was one "course of conduct" (Cf. *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218 (1952)). Therefore, if forfeitures were to be exacted, only one hundred dollars a day in forfeiture would be granted. To require defendant to pay on more than one order in these circumstances would be duplicitous.

Since, however, we hold that the orders on which the Government bottoms its claim for forfeitures are partially defective and since we only enforce those portions of the orders which we find unobjectionable, defendant had a valid reason for challenging these orders as prepared. Therefore, we find the Government has no right to forfeitures under the circumstances.

Let a final order and judgment be settled on notice directing compliance in accordance with our conclusions and dismissing the claim for forfeitures upon the merits.

March 15, 1960.

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U. S. D. J.

[fol. 247]

IN UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

JUDGMENT

The above-entitled action having come on for trial before me on the 25th day of January, 1960, and the trial having been continued through the 26th day of January, 1960, and the plaintiff having appeared by S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York (William F. Suglia, Assistant United States Attorney, and J. B. Truly, Attorney, Federal Trade Commission, of counsel), and defendant having appeared by LeBoeuf, Lamb & Leiby, Esqs. (Horace R. Lamb, H. Richard Wachtel and Douglas H. Hawes, Esqs., of counsel), and the respective parties by their attorneys having entered into a stipulation of all relevant and material facts, and said stipulation of facts having been admitted into evidence, and the Court having heard the arguments of counsel, and having considered the facts as stipulated and the arguments of counsel, and the Court having filed its opinion on the 16th day of March, 1960,

Now, on motion of S. Hazard Gillespie, Jr., attorney for plaintiff, it is

Ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this judgment, questions 1c, 2a, 2c, 3b, 3d, 3f, 3h(2), 3i, 5a, 5b, 5c, 5f, 5h, 5i, 6a, 6b, 6c, 6d, 6e, 6f, 6h, 6i, 7a, 7b, 7c, 7d, 7e, 7f, 7g, 7h, 8a, 8b, 8d, 8e(1), 8e(3), 8f, 8h, 8i, 9b and 10b, set forth in Order No. 1 issued by the Federal Trade Commission on January 9, 1959; and it is

[fol. 248] Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 1e, 1f, 1g and 1i, set forth in the aforesaid Order No. 1 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this

judgment, questions 2b, 2d, 4b, 4c, 4d, 5b, 6a, 6b and 6c, set forth in Order No. 2 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 3a, 3b and 3d, set forth in the aforesaid Order No. 2 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this judgment, questions 2b, 2d, 5c, 5d, 5e and 6c(3), set forth in Order No. 3 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 3a, 3b and 3d, set forth in the aforesaid Order No. 3 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this judgment, questions 2b, 4a, 4b, 4c, 4d, 4e, 4f, 5b and 5c, [fol. 249] set forth in Order No. 4 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 3a, 3b and 3d, set forth in the aforesaid Order No. 4 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this judgment, questions 2b, 2e, 4b(2), 4c, 4e, 5a, 5b, 5c, 5d and 5f, set forth in Order No. 5 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 3a, 3b and 3d, set forth in the aforesaid Order No. 5 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this judgment, questions 2b, 2c, 2d, 2e, 4b(2) and 4c, set forth in Order No. 6 issued by the Federal Trade Commission on January 9, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 3a, 3b and 3d, set forth in the aforesaid Order No. 6 issued by the Federal Trade Commission on January 9, 1959; and it is

[fol. 250] Further ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this judgment, questions 1a, 1c, 3a, 3b, 3c, 4a and 4b, set forth in Order No. 7 issued by the Federal Trade Commission on June 8, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 2a and 2b, set forth in the aforesaid Order No. 7 issued by the Federal Trade Commission on June 8, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to within 30 days of the entry of this judgment, questions 2b, 4b, 5b(4), 5b(5), 6a and 6b, set forth in Order No. 8 issued by the Federal Trade Commission on June 8, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this judgment, questions 3a, 3b and 3d, set forth in the aforesaid Order No. 8 issued by the Federal Trade Commission on June 8, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 30 days of the entry of this judgment, questions 1, 2a, 2b, 2c, 2d, 4a, 4c, 5a, 5b and 6, set forth in Order No. 9 issued by the Federal Trade Commission on June 8, 1959; and it is

Further ordered and adjudged that the defendant comply with and respond to, within 60 days of the entry of this

judgment, questions 3a, 3b and 3d, set forth in the aforesaid [fol. 251] Order No. 9 issued by the Federal Trade Commission on June 8, 1959; and it is

Further ordered and adjudged that the cause of action alleged in Count Two of the Complaint be and the same hereby is dismissed with prejudice.

Dated: New York, N. Y., April 21, 1960

Sylvester J. Ryan, U. S. D. J.

Entered 4/21/60

Herbert A. Charlson, Clerk.

[fol. 252]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 150-271

UNITED STATES OF AMERICA, Plaintiff,

v.

ST. REGIS PAPER COMPANY, Defendant.

DEFENDANT'S NOTICE OF APPEAL—Filed June 20, 1960

Notice is hereby given that St. Regis Paper Company, the defendant herein, hereby cross-appeals to the United States Court of Appeals for the Second Circuit, from all of the Judgment entered in this action on April 21, 1960, except so much thereof as orders and adjudges that the cause of action alleged in Count Two of the Complaint be dismissed with prejudice.

Dated: June 20, 1960.

LeBoeuf, Lamb & Leiby, Attorneys for Cross-Appellant, Office & P. O. Address, 15 Broad Street, New York 5, New York.

[fol. 253] To: Herbert A. Charlson, Esq., Clerk, United States District Court, Southern District of New York, United States Court House, Foley Square, New York 7, New York.

S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, Attorney for Plaintiff-Appellant, Office and Post Office Address: United States Court House, Foley Square, New York 7, New York.

[fol. 254]

IN UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. No. 150-271

UNITED STATES OF AMERICA, Plaintiff,

v.

ST. REGIS PAPER COMPANY, Defendant.

PLAINTIFF'S NOTICE OF APPEAL—Filed June 20, 1960

Sirs:

Please take notice that the plaintiff, United States of America, hereby appeals to the United States Court of Appeals for the Second Circuit from that portion of a [fol. 255] final order in favor of the above named defendant and against the above named plaintiff, entered herein, in the Office of the Clerk of the United States District Court for the Southern District of New York, on April 21, 1960, dismissing the cause of action alleged in Count Two of the complaint, and from each and every part of said portion of the order both on questions of law and questions of fact.

Dated: New York, New York
June 20, 1960

Yours, etc.

S. Hazard Gillespie, Jr., United States Attorney for the Southern District of New York, Attorney for Plaintiff, Office & Post Office Address: United States Court House, Foley Square, New York 7, New York.

To: Herbert A. Charlson, Esq., Clerk, United States District Court, Southern District of New York, United States Court House, Foley Square, New York 7, New York.

LeBoeuf, Lamb & Leiby, Esqs., Attorneys for Plaintiff, 15 Broad Street, New York, New York.

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[fol. 256]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—October Term, 1960

Argued September 30, 1960

Docket No. 26413

UNITED STATES OF AMERICA, Appellant,

—v.—

ST. REGIS PAPER CO., Appellee.

Before: Lumbard, Chief Judge, Tuttle* and Friendly, Circuit Judges.

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* Sitting by designation.

Cross-appeals from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *J.*, 181 F. Supp. 862, directing that respondent file special reports under §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), and dismissing claim for statutory penalties for default in filing reports.

Affirmed in part and reversed in part.

[fol. 257] Richard H. Stern, Washington, D. C. (Robert A. Bicks, Assistant Attorney General, Richard A. Solomon, Washington, D. C., S. Hazard Gillespie, Jr., United States Attorney, Southern District of New York, Daniel J. McCauley, Jr., General Counsel, Federal Trade Commission, Alan B. Hobbes, Assistant General Counsel, Federal Trade Commission, New York, N. Y., J. B. Truly, Attorney, Federal Trade Commission, Washington, D. C., on the brief), for appellant.

Horace R. Lamb, New York, N. Y. (H. Richard Wachtel, Douglas W. Hawes, LeBoeuf, Lamb & Leiby, New York, N. Y., on the brief), for appellee.

OPINION—Decided December 16, 1960

LUMBARD, *Chief Judge*:

These are appeals from a judgment of the United States District Court for the Southern District of New York, Ryan, *J.*, in which the court partially enforced nine orders issued by the Federal Trade Commission against the St. Regis Paper Company and seven of its subsidiary corporations directing that special reports be filed and dismissed a claim for statutory penalties brought by the United States against St. Regis. By resolution of January 6, 1959, the Federal Trade Commission instituted an investigation into the acquisition by St. Regis of the stock and/or assets of other corporations engaged in interstate commerce in order to determine whether §7 of the Clayton Act, 15 U. S. C. §18, had been violated. On January 9, 1959, the Commission issued orders to St. Regis in New York City and five of its

wholly-owned corporations located in various parts of the [fol. 258] country.[1] These orders allowed the addressees thirty days to respond in writing in a "special report" to questions posed by the Commission and demands for copies of agreements, correspondence, office memoranda, annual reports, schedules, minutes of meetings, accountants' reports, and statistical summaries. St. Regis' motion to vacate the resolution and orders was denied by the Commission on May 6, 1959, and compliance ordered by May 28. On June 4, 1959, the Commission resolved to broaden its investigation to cover the acquisition of two other corporations[2] by St. Regis. Orders dated June 8, 1959 allowed St. Regis and the two subsidiaries thirty days to file special reports similar in content to those requested by the earlier directives.

Upon deciding that the material submitted to it did not meet its demands, the Commission filed notices of default against St. Regis and its subsidiaries on June 18 and July 22. The United States then brought suit in the Southern District of New York under §9 of the Federal Trade Commission Act, 15 U. S. C. §49, asking that a mandatory injunction issue commanding the corporations to file the special reports as requested and that the statutory penalties provided for by §10 be assessed at the rate of $200 per day against St. Regis for its failure to respond to the two orders directed to it. The defendant's motion to strike the second demand on the ground that such relief would be unconstitutional was denied, 24 F. R. D. 366 (S. D. N. Y. 1959), and the case went to trial in the district court on both counts. Judge Ryan held that the Commission had the authority under §6(b) of the Federal Trade Commission [fol. 259] Act, 15 U. S. C. §46(b), to order special reports in connection with pre-complaint investigations of possible

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[1] Growers Container Corp. (Salinas, Calif.), F. J. Kress Box Co. (Pittsburgh, Penna.), Pacific Waxed Paper Co. (Seattle, Wash.), Pollock Paper Corp. (Dallas, Texas), Rhinelander Paper Co. (Rhinelander, Wis.).

[2] Cupples-Hesse Corp. (St. Louis, Mo.), Northwest Door Co. (Tacoma, Wash.).

violations of the Clayton Act, §7; that some of the questions posed by the Commission were so vague and uncertain as to be unenforceable; and that the statutory forfeiture could not be invoked to penalize non-compliance with orders which are partially defective. 181 F. Supp. 862 (S. D. N. Y. 1960). The judgment below therefore modified the terms of the original orders insofar as it directed the defendant and its subsidiaries to reply only to those questions held enforceable and dismissed the second count of the government's complaint. The United States appeals from the dismissal, and St. Regis cross-appeals from the part of the judgment granting injunctive relief.

I.

Were we to accept literally the language of §2 of the Expediting Act, 49 U. S. C. §45,[3] we would be required to dismiss these appeals although both parties urge us to hear them. That statute, as amended, provides in terms that in "every civil action" which the United States brings as a plaintiff in the district courts under the Sherman Act, Interstate Commerce Act, or "any other Acts having a like [fol. 260] purpose" thereafter enacted, appeals from final judgments are to "lie only to the Supreme Court." Both of the instant appeals are from a judgment entered in a civil suit instituted by the United States against various corporations under a statute which contains provisions similar

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[3] The relevant provisions of the statute as amended to date (56 Stat. 199, 62 Stat. 989) are as follows:

That in any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, "An Act to regulate commerce," approved February 4, 1887, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is plaintiff, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance • • •

Sec. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

in purpose to those of the Sherman Act.[4] However, we have construed the language of the statute, which as a result of an amendment of 1948 (62 Stat. 989) relates to "every civil action" instead of to "every suit in equity," as including only suits akin to actions in equity. *United States* v. *New York, N. H. & H. R.R.*, 276 F. 2d 525, 543 (2d Cir. 1959). The statutory penalty sought by the United States in its appeal is, indeed, not at all similar to equitable relief. However, this fact alone is not decisive of the question before us. Since the heart of the issue being litigated is the scope of authority delegated to the Commission by Congress, the request for a forfeiture is but auxiliary to the demand for compliance. Thus, even if we were inclined to allow an appeal from one part of a judgment if an appeal from another part of the same judgment would properly lie only to the Supreme Court, we would not consider alone the appeal of the United States in this case. The unseverability of the issues to be decided requires that they all be determined in one action by the tribunal which is to pass on the basic question presented.

Nonetheless, we feel that a reasonable construction of the Expediting Act grants this court jurisdiction over appeals such as the one now before us. The writ of mandamus [fol. 261] authorized by §9 is, it is true, very much like a mandatory injunction, cf. *Miguel* v. *McCarl*, 291 U. S. 442, 452 (1934), particularly since it is addressed not to some public official or body but to a private corporation.[5] But it

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[4] Not only is any violation of the Sherman and Clayton Acts also a violation of §5 of the Federal Trade Commission Act, *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 609 (1953), but the Federal Trade Commission is expressly authorized by §6 of the Act to investigate antitrust violations and by §7 to act as a "master in chancery" to report on the proper form of an antitrust decree. Moreover, §11 of the Clayton Act, 15 U. S. C. §21, authorizes the Commission to enforce compliance with §7 of the Act.

[5] In *United States* v. *Morton Salt Co.*, 80 F. Supp. 419 (N. D. Ill. 1948), aff'd, 174 F. 2d 703 (7th Cir. 1949), rev'd, 338 U. S. 632 (1950), discussed *infra*, the request sought by the Attorney General under §9 was framed not as a petition for mandamus but as a request for a mandatory injunction. See 80 F. Supp. at 425. The request in this case was similarly phrased.

would be unreasonable to hold that the type of relief sought here by the Commission or the kind of determination which is to be made on such petitions for mandamus were deemed important enough by Congress to require a clear path from the district court to the Supreme Court of the United States.

Under 15 U. S. C. §45 as it stood before being amended in 1938, 52 Stat. 111, the Federal Trade Commission, to make its order final, was required to bring enforcement proceedings in the Court of Appeals upon learning that the order had been violated, and until 1959 all cease-and-desist orders issued by administrative agencies pursuant to §11 of the Clayton Act, 15 U. S. C. §21, had to be enforced in the same way. See 73 Stat. 243 (1959). Appeals from cease-and-desist orders of the Commission under 15 U. S. C. §§21(g), 45(g) are still taken to the Court of Appeals. Thus, were we to hold that the mandamus provision of §9 brings actions for the enforcement of preliminary requests for information within §2 of the Expediting Act, we would be conceding greater significance to the early investigatory stages of a Clayton Act proceeding than to the final determination of the enforcing agency. Furthermore, it is only because the Federal Trade Commission Act delegates to the Attorney General, rather than to the Commission, the authority to seek mandamus for compliance with the Commission's orders that the conditions of the Expediting Act, [fol. 262] which requires that the United States be plaintiff, is met in this case. The analogue to this provision appeared, as well, in the Interstate Commerce Act of 1887, §20(9), now 49 U. S. C. §20(9). That §2 of the Expediting Act has not been interpreted to cover these mandamus suits is indicated by *United States* v. *Munson S.S. Line*, 33 F. 2d 211 (D. Md. 1929), aff'd, 37 F. 2d 681 (4th Cir. 1930), aff'd, 283 U. S. 43 (1931), in which a suit by the Attorney General under §20(9) was heard first in the district court, then appealed to the Circuit Court of Appeals for the Fourth Circuit, and finally heard on certiorari in the Supreme Court with no discussion whatsoever of the jurisdictional question. In light of the policy objectives of the Expediting Act, we conclude that these proceedings were not to be brought into the class of those entitled to accelerated review

merely because the Attorney General had the sole authority to seek their enforcement. Accordingly, we hold that these appeals are properly before this court.

II.

The information requested by the Commission was to be submitted in "special reports" pursuant to §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), which is set forth in the margin.* St. Regis contends that the [fol. 263] Commission's authority to require special reports under §6(b) does not extend to antitrust investigations but is limited to discovery of unfair competitive practices under §5 of the Act and violations of court or agency decrees entered under that section.

In *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950), the Supreme Court upheld a Commission order requiring corporations to file reports showing how they had complied with an earlier order of the Commission. The respondent corporation in that case contended that §6(b) could be used only in aid of the Commission's power to compile information for general economic surveys under §§6(a) and 6(f) and was independent of the enforcement procedures set forth in §5. The court rejected this contention and held that §6 could be used for "any purpose within the duties of

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* Sec. 6

"The Commission shall also have power * * * (b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

the Commission, including a §5 proceeding." 338 U. S. at 649. Since §5 "minimally • • • registers violations of the Clayton and Sherman Acts," *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 609 (1953), the §6 powers are available to the Commission in precomplaint antitrust proceedings as well.

The respondents here maintain, however, that the statement in *Morton Salt*, insofar as it authorizes antitrust investigations, should be read as referring to §§6(c), (d), and (e) which explicitly delegate to the Federal Trade Commission the following duties: at the behest of the Attorney General to investigate compliance with antitrust decrees; upon the direction of the President or either House of Congress to investigate alleged violations of the antitrust acts; and upon application by the Attorney General to recommend readjustments in the business of any corpora- [fol. 264] tion alleged to be violating the antitrust acts. These investigations, when carried out by the use of the usual discovery tools provided for in §9, it is argued, constitute the limit of the Commission's authority with regard to the antitrust acts. The legislative history of the statute, as well as reasonable statutory construction, belie these contentions.

It is clear from the House and Senate reports that the purpose of §6 was to give the Commission the powers with respect to investigating and reporting on antitrust matters that were previously committed to the Bureau of Corporations in the Department of Commerce. In the form first passed by the House[7] §3 of the Act expressly transferred these functions, and §9 required corporations of a minimum size to furnish annual and special reports and such information, statements, and records relating to organization, financial condition, and relation to other corporations as the Commission would require. Section 16 then gave the Commission subpoena powers identical to those given to the Interstate Commerce Commission by the Act of 1887. The report accompanying the Committee draft of the bill, H. R. Rep. No. 533, 63d Cong., 2d Sess. (1914),

[7] H. R. 15613, 63d Cong., 2d Sess. (1914).

said that while the investigative powers which had been given to the Bureau of Corporations had been extensive, "there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce." *Id.* at 2. The report requirement, together with a $100-a-day penalty for default, was therefore incorporated into the then §9. The Senate, in proposing an entirely new draft,[8] authorized the [fol. 265] Commission in its §3(b) to require corporations to furnish information and records concerning their business and their relations to other corporations and to produce for examination all papers relating to the commerce in which the corporations under inquiry were engaged. In addition, §3(c) authorized the Commission to require annual and special reports, and §8 gave it the investigative powers possessed by the Interstate Commerce Commission. These powers of investigation were said to be "not greatly in excess of those possessed and for years exercised by the Bureau of Corporations." S. Rep. No. 597, 63d Cong., 2d Sess. 12 (1914). Thus, both versions agreed in giving the Commission power to investigate by requiring annual and special reports as well as by ordering records to be produced.

In conference, however, these powers were merged into §§6(a) and 6(b), and the subpoena power was spelled out in §9.

The House conferees' report said:

> "The Bureau of Corporations is abolished, as in the House Bill, and its powers are conferred on the Commission. Instead of transferring them by reference to the original act creating the bureau, as in section 3 of the House Bill, they are explicitly set out in section 6, paragraph (a), of the bill as agreed to by the conferees. This has been done because the bill now gives to the Commission certain powers which so continuously and directly concern the business interests of the country that it is desirable to have the law show on its face its

[8] S. 1460, 63d Cong., 2d Sess. (1914).

exact extent and application." H. R. Rep. No. 1142, 63d Cong., 2d Sess. 18 (1914).

The report manifests quite clearly Congress' intent to have the Commission assume the powers of the Bureau of [fol. 266] Corporations and its expression of that intent in §§6(a) and 6(b).

Moreover, there is no indication in the statute that antitrust investigations are in any way distinguishable procedurally from investigations directed at uncovering violations of the unfair-competition aspect of §5. The detailed enumeration of duties in §§6(c), (d) and (e) neither expressly nor impliedly denies the Commission the power to proceed upon the request of the Attorney General, President, or Congress by use of the powers granted by §6(b); the inclusion of all these provisions within one section of the statute suggests the contrary. And if the Commission may investigate charges of antitrust violations filed by Congress or the President by directing that annual or special reports be filed, it would be anomalous to deny it the use of these same techniques when it is exercising its own obligation under §11 of the Clayton Act to police violations of §7. We therefore hold that the Commission is empowered under §6(b) to require reports with respect to investigations into possible violations of the antitrust laws.

No challenge has been made by the appellants to the scope of the Commission's order, so we do not now undertake to decide whether §6(b) and §9 provide alternative routes or whether only material which cannot be reached by the subpoena power of §9 may be demanded in a §6(b) order.

III.

Among other papers which the Commission directed be produced by St. Regis and its affiliates were copies of various schedules submitted to the Bureau of Census for the 1954 and 1958 Census of Manufactures, the 1955, 1956, and 1957 Surveys of Manufactures, and correspondence relating thereto. The respondents did not contend that copies were not available but maintained instead that ordering [fol. 267] their production violated the confidentiality pro-

vision of §9 of the Census Act, 13 U. S. C. §9.* However, the plain terms of that statute apply only to the Department of Commerce and do not bar any other federal agency from divulging such information if it comes from different sources or from demanding that a copy remaining in the respondent's files be produced. The purpose of the prohibition addressed to the Secretary of Commerce and his staff in the Census Act is served if they are denied the power to transmit submitted information to other governmental agencies or to individuals. But there is no reason to protect absolutely the underlying data or to insulate the source of the information from any further inquiry. The manufacturer is under no statutory obligation to hold a copy of his submitted schedule in his files; if he chooses in this way to keep a summary of information which is scattered throughout his records, the particular paper on which the data is collected is no more immune from ordinary discovery procedures than any other document in his possession. Although the Census Bureau printed across the bottom of the copy page, "Keep This Copy For Your Files," there was, in fact, no obligation on the respondents to do so. Clearly the Census Bureau's action cannot confer any immunity on such records through gratuitous suggestion. We agree with the district court that the protection afforded income tax returns under §6103 of the Internal Revenue Code of 1954 [fol. 268] presents a close analogy. The originals of such returns are confidential, but copies retained in the taxpayer's files are subject to subpoena. E.g., *United States* v. *O'Mara*, 122 F. Supp. 399 (D. D. C. 1954). We disagree

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* "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

"(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit any other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports."

with the Seventh Circuit's decision regarding this same issue in *FTC* v. *Dilger*, 276 F. 2d 739 (7 Cir. 1960), cert. denied, —— U. S. —— (1960).

IV.

We turn now to the question whether, under the circumstances, the statute required the district judge to assess a penalty of $100 against St. Regis for each day on which it was in default in filing the requested reports. The district court decided that although the Commission had the power to issue the orders, some of the questions propounded and requests made were too vague to be enforced. Finding authorization to modify enforcement of the orders in §6(c) of the Administrative Procedure Act, 5 U. S. C. §1005(c), Judge Ryan directed that only the enforceable questions be answered. Cf. *NLRB* v. *Anchor Rome Mills, Inc.*, 197 F. 2d 447 (5 Cir. 1952). He held, however, that the forfeiture provided in §10 of the Federal Trade Commission Act was "sufficiently analogous to a criminal sanction" to justify applying to it the requirements of clarity and certainty ordinarily demanded of criminal penalties. Since approximately twelve percent of the questions asked in all the orders were held to be vague and uncertain, the district judge refused to assess the $100-a-day penalties demanded by the United States.

The United States appeals only from the refusal to assess penalties and does not dispute Judge Ryan's decision that twenty-eight questions were too vague to be answered. Thus, the only question before us on the appeal of the United States is whether the district court committed error [fol. 269] in dismissing the government's claim for statutory penalties.

Were this a case involving a single oversight or an honest mistake in a good-faith attempt to comply with the Commission's order, the statute's absolute and imperative terms would not prevent us from assuming that it could not have been Congress' intent so severely to punish an innocent offender. *United States* v. *Northern Pac. Ry.*, 242 U. S. 190 (1916); see *Kerr S.S. Co.* v. *United States*, —— F. 2d —— (2 Cir. 1960). The facts before us, however, suggest no

such mitigating circumstances. The respondents cannot claim that theirs was merely an honest omission since they refused to accede to many of the Commission's requests for documents and information on the sole ground that the Commission had no authority to demand what was requested. That the respondent's recalcitrance was caused by a wrong guess on a disputed issue of law does not prevent it from being held to "lawful consequences attached to the refusal." *Life & Cas. Ins. Co.* v. *McCray*, 291 U. S. 566, 574 (1934); see *United States* v. *Clyde S.S. Co.*, 36 F. 2d 691 (2 Cir. 1929); *FTC* v. *Maynard Coal Co.*, 22 F. 2d 873 (D. C. Cir. 1927).

The respondents argue, however, that the reports demanded by the Commission in the present case consisted of questions directed at particular information, and that a comparison of §6(b) with §10 discloses that although the Commission is empowered to order the filing of "answers in writing to specific questions" as well as annual or special reports, it is only the failure to file reports which is penalized by §10. In support of this contention we are urged to consider the decision in *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y. 1938).

The information requested by the Commission is indeed much like that demanded in the *National Biscuit Co.* case, see 18 F. Supp. at 669-70, but it is by no means certain that [fol. 270] we would have agreed with the district court's disposition of that case had it been appealed. On the facts of this case we cannot say that the orders directed at St. Regis were requests for "answers to specific questions" rather than demands for reports. The line between the two is, by the nature of each, quite indistinct. Reports that are demanded by the Commission will necessarily be addressed towards more-or-less specific inquiries. A compliance report conveys details concerning activity undertaken pursuant to an order; an investigation report divulges facts concerning suspected violations. It would be totally unreasonable to withdraw from the Commission the coercive effect of the §10 penalty whenever it makes its wants known in detail but permit it to use the threat of a mounting forfeiture so long as it cloaks the foci of inquiry behind gen-

eral language. Although it is entirely reasonable to read the statute so as not to fine one who has failed only to respond to one or several specific interrogatories and to remit the Commission to a suit in mandamus for enforcement of such a request, when the quantity of interrogatories reaches the proportions of those in this case and the request is made pursuant to a full investigation of a respondent's course of conduct, the cumulative effect of all the questions is substantially that of a request for a report.

The respondents further urge that infliction of the penalty would violate the due process clause of the Fifth Amendment since they would be unable, under *FTC* v. *Claire Furnace Co.*, 274 U. S. 160 (1927), to test the validity of the order save by awaiting and defending the suit in mandamus, with penalties accumulating all the while. If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. Cf. [fol. 271] *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). However, the *Claire Furnace* case was decided before either the Declaratory Judgment Act of 1934, 48 Stat. 955, or the Administrative Procedure Act of 1946, 60 Stat. 237, was enacted. Mr. Justice Jackson, speaking for a unanimous Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 654 (1950), intimated broadly that *Claire Furnace* should not stand in the way of declaratory relief or prompt review if that be necessary to rescue the penalty provision from attack under the Fifth Amendment. We hold that under the declaratory-judgment statute as it now stands, 28 U. S. C. §2201, a proceeding brought to test the validity of an administrative agency's demand for a special annual report, when daily penalties may be assessed for failure to comply with any valid request, amounts to a "case of actual controversy" and is within the jurisdiction of the United States district courts. The respondent bringing such an action would be effectively denied judicial review if he is permitted no forum in which to challenge the validity and scope of the agency's order; his injury, therefore, is immediate enough to warrant judicial intervention even if

the agency is not prepared to institute court proceedings to achieve compliance. Since the statute confers discretion on the courts to act when the injury is irremediable, *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, 241 (1952); *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U. S. 426, 434 (1948), and since the controversy between the parties is clear, and the potential injury to the respondent is evident, the exercise of equitable discretion is appropriate. Moreover, it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds.

We are also of the opinion that a remedy was available to St. Regis under §10(c) of the Administrative Procedure Act, 5 U. S. C. §1009(c). The investigatory order [fol. 272] authorized by §6(b) of the Federal Trade Commission Act may not satisfy the statutory definition of "order" in §2(d) of the Administrative Procedure Act, 5 U. S. C. §1001(d), since it may not be a "final disposition." However, the order amounts to a "sanction" under §2(f) since nonperformance of the Commission's demand entails a penalty of $100 a day, and the directive therefore constitutes "compulsory or restrictive action."

The availability of this relief also mitigates the dilemma which our decision here imposes upon district judges. Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, it carries with it the imposition of penalties for prior noncompliance. A district judge might believe that the assessment of a forfeiture would be unfair in light of the substantial defects in the agency's order, and might thus be encouraged merely to deny the petition for mandamus thereby forcing the agency to re-issue the valid portions of its order. Whether, as a result of §6(c) of the Administrative Procedure Act, such a total refusal may be sustained is a question which hinges on the construction of the word "subpoena" in the statute, and we do not decide it here. In view of the opportunity given to a respondent to attack an order requesting a special report by a declaratory-judgment proceeding, the exaction of the statutory penalties for noncompliance is fair

in any case in which the respondent awaits a mandamus action before contesting the agency's demands, and the order is held valid.

Finally, we agree with Judge Ryan's decision—which the United States has not disputed in its briefs—that only one course of conduct was being investigated and that the second order issued to St. Regis was merely supplementary to the first. Thus, only one penalty of $100 should be assessed for each day of noncompliance.

[fol. 273] The judgment below is, therefore, reversed insofar as it dismissed the demand for penalties under §10 of the Federal Trade Commission Act, and the case is remanded with instructions to enter judgment for the United States in the amount of $100 a day for each day on which St. Regis was in default of the first order requiring a special report.

FRIENDLY, *Circuit Judge* (concurring):

I join in Chief Judge Lumbard's disposition of the many issues in this case. But I see little basis and less occasion for the statement that the availability of methods for securing an early determination of the validity of a direction under §6(b) of the Federal Trade Commission Act, pursuant to statutes passed long afterwards, necessarily renders exaction of the statutory penalties "fair" in any case where the respondent has not chosen to use them. If he prefers to await suit and then succeeds in demonstrating such extensive invalidity that there is no longer an intelligible requirement for an "annual or special report," he is entitled to prevail. Per contra his utilization of the Declaratory Judgment Act or the Administrative Procedure Act will not avail him if he proves wrong, save, of course, for such periods as the direction has been stayed.

[fol. 274]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Elbert P. Tuttle, Hon. Henry J. Friendly, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ST. REGIS PAPER COMPANY, Defendant-Appellant.

JUDGMENT—December 16, 1960

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed in so far as it dismissed the demand for penalties under §10 of the Federal Trade Commission Act, and that the action be and it hereby is remanded with instructions to enter judgment for the plaintiff-appellant, United States, in the amount of $100.00 a day for each day on which defendant-appellant, St. Regis Paper Company, was in default of the first order requiring a special report in accordance with the opinion of this court.

[fol. 275] [File endorsement omitted]

[fol. 276]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—October Term, 1960

Docket No. 26413

UNITED STATES OF AMERICA, Appellant,

v.

ST. REGIS PAPER CO., Appellee.

Before Lumbard, Chief Judge, Tuttle and Friendly, Circuit Judges.

ALLOWANCE OF MOTION TO STAY ISSUANCE OF MANDATE —January 10, 1961

The mandate is stayed for a period of 30 days pending application to the Supreme Court of the United States for a writ of certiorari, and subject thereafter to the provisions of Rule 28 (c) (2) of this court; and provided further that should the Supreme Court limit any grant of certiorari to less than all of the issues presented, then the stay of mandate shall automatically dissolve with respect to the issues on which certiorari is not granted.

Elbert P. Tuttle (per H. J. F.), Henry J. Friendly.

10 January 1961

I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed.

J. Edward Lumbard, Chief Judge.

[fol. 276a] [File endorsement omitted]

[fol. 277]

IN UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Present: Hon. J. Edward Lumbard, Chief Judge, Hon. Elbert P. Tuttle, Hon. Henry J. Friendly, Circuit Judges.

UNITED STATES OF AMERICA, Plaintiff-Appellant,

v.

ST. REGIS PAPER COMPANY, Defendant-Appellee.

ORDER GRANTING MOTION TO STAY ISSUANCE OF MANDATE —January 10, 1961

A motion having been made herein by counsel for the appellee to stay the issuance of the mandate pending application for a writ of certiorari to the Supreme Court of the United States and for other and further relief,

Upon consideration thereof, it is

Ordered that the mandate be and it hereby is stayed for a period of thirty days pending application for a writ of certiorari to the Supreme Court of the United States pursuant to Rule 28 (c) (2) of this court.

Further ordered that should the Supreme Court limit any grant of certiorari to less than all the issues presented, then the stay of the mandate shall automatically dissolve with respect to the issues on which certiorari is not granted.

[fol. 277a] [File endorsement omitted]

[fol. 278]

SUPREME COURT OF THE UNITED STATES

No. 704, October Term, 1960

ST. REGIS PAPER COMPANY, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 27, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted limited to Questions 2, 3, 5, and 6 presented by the petition which read as follows:

"2. Does an order and judgment of the District Court under Section 6 (c) of the Administrative Procedure Act, modifying agency investigative process, carry with it liability for forfeitures for non-compliance with the original unmodified agency process?

"3. Did the orders of the Commission, purportedly issued pursuant to Section 6 (b) of the FTC Act, constitute a requirement that petitioner furnish 'answers in writing to specific questions', and not a requirement of a 'special report', so that the provisions of the third unnumbered paragraph of Section 10 of the FTC Act, providing for forfeitures in the sum of $100 per day for each day of failure to file a 'report', have no application?

"5. Are petitioner's retained file copies of confidential reports to the Bureau of Census for the Census of Manufactures subject to the investigative processes of the Commission?

"6. Does the investigative power asserted by the Commission under Section 6 (b) of the FTC Act, if not reviewable except at the risk of paying forfeitures accumulated at the rate of $100 per day throughout the period of non-compliance, including the period of judicial review,

deprive petitioner of its property without due process of law?"

[fol. 279] Since time will not permit a hearing and determination of these issues until our next Term, petitioner's motion pursuant to § 10 (d) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. (1958 ed.) § 1009 (d), is granted to the extent of tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under § 10 of the Federal Trade Commission Act, 38 Stat. 723, 15 U. S. C. (1958 ed.) § 50. Petitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY,
SUPREME COURT, U. S.

Office Supreme Court, U.S.
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FEB 7 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible] 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

ST. REGIS PAPER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, St. Regis Paper Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered December 16, 1960, which affirmed, in part, and reversed, in part, the judgment of the United States District Court for the Southern District of New York.

Citations of Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit (Dec. 16, 1960) has not been reported in the Federal Reporter. It is reported in CCH Trade Regulation Reporter, Paragraph 69,880, and is

printed in the appendix hereto, pages 1a to 19a. The opinion of the District Court is reported in 181 F. Supp. 862 and is printed in the record[1] filed with this petition at pages 140 to 156.

Jurisdiction of this Court

The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

Questions Presented

The judgment of the Court of Appeals for the Second Circuit (a) affirmed that part of the judgment of the District Court requiring petitioner to answer part (approximately one-third) of the questions contained in investigative orders of the Federal Trade Commission (the "Commission") and (b) reversed the District Court's dismissal of a claim for forfeitures demanded under the third paragraph of Section 10 of the Federal Trade Commission Act (the "FTC Act"). The questions presented are:

1. Did the Court of Appeals have jurisdiction to entertain the appeal of the United States from the judgment of the District Court in view of the provisions of Section 2 of the Expediting Act?

2. Does an order and judgment of the District Court under Section 6(c) of the Administrative Procedure Act, modifying agency investigative process, carry with it liability for forfeitures for non-compliance with the original unmodified agency process?

---

1. References hereinafter to the "Appendix" are to the appendix to this petition; references to the "Record" are to the appendix record below, nine copies of which have been filed in accordance with paragraph 4 of Rule 21 of this Court. All references to pages in the Record are to the numbers written in ink at the bottom of such pages.

3. Did the orders of the Commission, purportedly issued pursuant to Section 6(b) of the FTC Act, constitute a requirement that petitioner furnish "answers in writing to specific questions", and not a requirement of a "special report", so that the provisions of the third unnumbered paragraph of Section 10 of the FTC Act, providing for forfeitures in the sum of $100 per day for each day of failure to file a "report", have no application?

4. Should petitioner be required to answer the portion of the Commission's questions which the District Court held were enforceable and not previously answered, where such orders were issued pursuant to Section 6(b) of the FTC Act for the stated purpose of investigating whether petitioner has violated Section 7 of the Clayton Act, one of the "antitrust acts", although only subdivisions (d) and (e) of said Section 6 expressly authorize investigations of violations of the "antitrust acts"?

5. Are petitioner's retained file copies of confidential reports to the Bureau of Census for the Census of Manufactures subject to the investigative processes of the Commission?

6. Does the investigative power asserted by the Commission under Section 6(b) of the FTC Act, if not reviewable except at the risk of paying forfeitures accumulated at the rate of $100 per day throughout the period of noncompliance, including the period of judicial review, deprive petitioner of its property without due process of law?

Statutes Involved

The statutes involved are: the Federal Trade Commission Act, Sections 4, 5, 6, 9 and 10 (38 Stat. 719 (1914), 52 Stat. 111 (1938), 38 Stat. 721, 722 and 723 (1914), 66 Stat. 631 (1952); 15 U.S.C. §§44, 45, 46, 49 and 50); the Administrative Procedure Act, Section 6(b), 6(c) and 10 (60 Stat. 240 and 243 (1946); 5 U.S.C. §§1005(b), 1005(c), and 1009); the Census Act, Sections 5 and 9 (68 Stat. 1013 (1954); 13 U.S.C. §§5 and 9) and the Expediting Act (32 Stat. 823 (1903), 62 Stat. 989 (1948); 15 U.S.C. §29, 49 U.S.C. §45). They are printed in the Appendix, *infra*, pp. 21a to 33a.

Statement

The respondent's (Government's) complaint was stated in two separate counts. The first demanded relief under Section 9 of the FTC Act,[2] which provides for "writs of mandamus",[3] to compel petitioner to comply with nine investigative orders of the Federal Trade Commission to determine whether Section 7 of the Clayton Act[4] was violated.[5] The second count demanded forfeitures pursuant to the third paragraph of Section 10 of the FTC Act[6] for each day that petitioner was claimed to be in default

2. 38 Stat. 722 (1914); 15 U.S.C. §49 (1952).

3. Although writs of mandamus were abolished by Rule 81(b) of the Federal Rules of Civil Procedure, the principles which apply in determining whether relief in the nature of mandamus should be granted were not changed by the Rule. *Hammond* v. *Hull*, 131 F. 2d 23 (D. C. Cir. 1942), cert. denied, 318 U. S. 777 (1943); *Securities and Exchange Commission* v. *Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E. D. Pa. 1953), aff'd. on other grounds, 209 F. 2d 44 (3d Cir. 1953).

4. 64 Stat. 1125 (1950), 15 U.S.C. §18 (1952).

5. Seven of the orders were directed to petitioner's former wholly-owned subsidiaries and two to petitioner.

6. 38 Stat. 723 (1914); 15 U.S.C. §50 (1952).

of the two orders issued to it. Since the claim was based on two "orders", the Government demanded forfeitures at the rate of $200 per day.

The action was defended on the grounds that there was no statutory basis for the Commission's orders and that, in any event, a great many of the questions contained in the orders were objectionable because they were vague and uncertain, required the production of privileged census reports or were duplicative of information previously furnished to the Commission.

As affirmative defenses, petitioner pleaded, among other things, that the Commission acted in contravention of the specific prohibition of Section 6(b) of the Administrative Procedure Act[7] and that the claim for accumulated civil penalties under Section 10 of the FTC Act, while the Commission's investigative powers were under court review, constituted a denial of due process.

After trial on stipulated facts, the District Court held (1) that the Commission had statutory authority to issue its "orders", but the Court refused to enforce the orders in the form issued because most of the questions contained therein were too vague and indefinite or required petitioner to duplicate the "vast amount of information it has supplied",[8] (2) that petitioner's retained file copies of census reports for the Census of Manufactures were not privileged, and (3) that, instead of acceding to petitioner's request that the matter be remitted back to the Commission with directions to issue new Commission orders in

7. Section 6(b) of the Administrative Procedure Act (60 Stat. 240 (1946); 5 U.S.C. §1005(b) (1952)) provides, in part, as follows:

> "Investigations.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law * * *".

8. Record, p. 149.

conformity with the Court's decision, the Court would adopt a "more practical method of dealing with these orders"[9] by treating the Commission's orders as "subpena[s] or similar process or demand", within Section 6(c) of the Administrative Procedure Act (5 U.S.C. §1005(c)) and issue its own order and judgment pursuant to such statute. The Court said:[10]

> "Defendant urges that having found portions of the orders indefinite, we must strike down the entire set. From a practical point of view, this seems silly since it would require the Commission to redraw and reissue the same orders. We believe that ordering partial compliance is a more practical method of dealing with these orders and feel that Section 6(c) of the Administrative Procedure Act, 5 U.S.C.A. 1005(c), affords us ample legal authority to modify these orders. (Cf. *N.L.R.B.* v. *Anchor Rome Mills*, 197 F. 2nd 447; *F.C.C.* v. *Cohn*, 154 F. Supp. 899)."

The District Court denied the Government's claim for forfeitures, saying:[11]

> "• • • the orders on which the Government bottoms its claim for forfeitures are partially defective and since we only enforce those portions of the orders which we find unobjectionable, defendant had a valid reason for challenging these orders as prepared. Therefore, we find the Government has no right to forfeitures under the circumstances."

The District Court entered an order and judgment directing petitioner to answer within 30 days all of the

9. Record, p. 149.
10. Record, p. 148.
11. Record, p. 151.

unobjectionable questions, except those requiring copies of reports to trade associations and copies of reports to the Census of Manufactures which were directed to be answered within 60 days. Petitioner answered fully all questions to be answered in the 30-day period. On the sixtieth day after the entry of the judgment, the Government served a notice of appeal to the Court of Appeals for the Second Circuit appealing from that portion of the District Court's judgment dismissing the Government's claim for forfeitures. Petitioner thereupon filed a notice of cross-appeal from the portion of the judgment requiring the furnishing of answers to the specific questions set out in the District Court's judgment, including the request for copies of reports to trade associations and census reports for the Census of Manufactures, which remained to be furnished.

Petitioner moved for a stay and suspension of the 60-day requirement of the District Court's order and judgment, which was granted. The stay was extended by the Court of Appeals pending its disposition of the appeal.[12]

The Government's appeal did not question the District Court's determination that approximately two-thirds of the questions were "objectionable" or called for information previously furnished and were not to be enforced, but appealed only from the District Court's denial of forfeitures.

Petitioner's cross-appeal raised the question of the constitutional and statutory power of the Commission to make the orders and also whether census reports were subject to the Commission's investigative process.

12. Record, pp. 14-16.

The Court of Appeals affirmed the District Court's holding that Section 6(b) of the FTC Act[13] empowered the Commission to issue its orders to petitioner and that file copies of census reports were not privileged under the Census Act, and reversed the District Court's judgment denying the Government's claim for forfeitures.

Even though relief in the nature of mandamus authorized by Section 9 of the FTC Act, claimed in Count I of the complaint, had not been granted and the District Court had entered its own order and judgment pursuant to Section 6(c) of the Administrative Procedure Act (from which the respondent did not appeal), the Court of Appeals nevertheless held petitioner liable for forfeitures, not at the rate of $200 per day, as claimed by the Government, but only at the rate of $100 per day.

Petitioner moved in the Court of Appeals for (1) a stay of its mandate until a petition to this Court for a writ of certiorari could be considered and, if granted, until the review by this Court could be determined and (2), pursuant to Section 10(d) of the Administrative Procedure Act[14], for postponement of the effective date of the Commission's orders in order to preserve the status of petitioner's rights pending a conclusion of review proceedings in this Court.

In an opinion and decision signed by Circuit Judges Tuttle and Friendly, the Court ordered its mandate stayed, as requested, but failed to grant petitioner's further application for postponement of the effective date of the

13. 38 Stat. 721 (1914); 15 U.S.C. §46(b) (1952).
14. 60 Stat. 243 (1946); 5 U.S.C. §1009(d) (1952).

Commission's orders. However, in a separate opinion, Chief Judge Lumbard stated:[15]

> "I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed."

The statement is a clear indication that the Chief Judge of the Court of Appeals would have granted petitioner's motion to postpone the effective date of the Commission's orders pending conclusion of review proceedings in the courts.

Concurrently with filing this petition for a writ of certiorari, petitioner has also filed a separate motion in this Court for an order postponing the effective date of the Commission's orders pending the conclusion of the review in this Court, as requested in this petition.

REASONS FOR GRANTING THE WRIT

I

This Court should consider the application of the Expediting Act to this appeal.

Section 2 of the Expediting Act, as amended,[16] provides in pertinent part as follows:

> "In every civil action brought in any district court of the United States • • • [under the Sherman Act, Interstate Commerce Act, or "any other Acts

15. Appendix, p. 20a.

16. 32 Stat. 823 (1903), 62 Stat. 989 (1948); 15 U.S.C. §29, 49 U.S.C. §45 (1952).

> having a like purpose"] wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

In the decision of the Court of Appeals granting petitioner's application for a stay and suspension of the portions of the judgment of the District Court requiring compliance within 60 days, Circuit Judge Friendly stated the following:[17]

> "The parties are requested to consider whether, under §2 of the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended by §17 of the Act of June 25, 1948, c. 646, 62 Stat. 989, the appeals have been properly taken to this Court, and to discuss this in their briefs. See *United States* v. *New York, New Haven & Hartford R. Co.*, 276 F. 2d 525, 537-543 (2d Cir. 1960) [*cert. denied sub nom. Tri-Continental Financial Corp.* v. *United States*, 362 U. S. 961 (1960)]."

In the briefs in the Court of Appeals, the Government took the position that the appeal had properly been taken to the Court of Appeals and that the provision of the Expediting Act had no application in the circumstances of this case. Petitioner's brief also expressed the belief that the appeal had been properly taken.

The Court of Appeals found the appeals properly taken to that Court, but said:[18]

> "Were we to accept literally the language of §2 of the Expediting Act, 49 U.S.C. §45, we would be required to dismiss these appeals although both parties urge us to hear them."

17. Record, p. 16.
18. Appendix, p. 4a.

However, as the parties cannot confer jurisdiction, the question must be decided by this Court.

Since the appeal of the United States from the judgment of the District Court was in a civil action brought by the United States as plaintiff and was founded upon the provisions of the FTC Act, the purpose of which is to protect trade and commerce, *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 435 (1920), there are grounds for holding that the Expediting Act does apply. So far as we are aware, this Court has never decided the question.

If the Court finds that the Expediting Act does apply, the judgment of the Court of Appeals below was a nullity. In that event the judgment of the District Court dismissing the Government's claim for forfeitures would stand unappealed unless the Government, in its brief in opposition to this petition, should request that the case be treated as an appeal taken by the Government directly to this Court and such request is granted.

II

The decision of the Court of Appeals is contrary to the requirement of the Administrative Procedure Act that partial enforcement of an administrative agency's subpoena or similar investigative process cannot carry with it liability for penalties for non-compliance prior to judicial review.

In its opinion, the Court of Appeals recognized that the District Court had not granted the Government's demand for mandamus,[19] but had, rather, exercised subpoena-enforcing powers under Section 6(c) of the Administra-

19. Appendix, p. 14a.

tive Procedure Act.[20] Since the orders were not enforced under the FTC Act, the treatment of the orders as "subpena[s] or similar process or demand" and the enforcement thereof under the Administrative Procedure Act make the decision below applicable to the enforcement of all agency investigative process falling within the classification of "subpena[s] or other similar process or demand" under the Administrative Procedure Act. The Court of Appeals held that where such enforcement power is exercised, even in part, penalties under the statute authorizing the process[21] must be adjudged for the recipient's noncompliance with the subpoena or similar process prior to judicial review. The Court said, without citing any authority:[22]

> "Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, it carries with it the imposition of penalties for prior noncompliance."

This is precisely what the legislative reports accompanying the Act said Section 6(c) was designed to prevent.

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20. This section is entitled "Subpenas". Although principally intended to regulate judicial enforcement of federal agency subpoenas it applies as well to "other similar process or demand."

21. Statutes which prescribe penalties for non-compliance with agency process include the Fair Labor Standards Act, Section 9 (52 Stat. 1065 (1938); 29 U.S.C. §209); the Interstate Commerce Act, Section 20(7)c (54 Stat. 918 (1940); 49 U.S.C. §20(7)c), and Section 46 (27 Stat. 443 (1893); 49 U.S.C. §46); the Securities Exchange Act of 1934, Section 32(b) (49 Stat. 1380 (1936); 15 U.S.C. §78ff(b); Communications Act of 1934, Section 409(m) (48 Stat. 1096 (1934), 66 Stat. 721 (1952); 47 U.S.C. §409(m)).

22. Appendix, p. 18a.

The House Report[23] stated:

> "• • • The section [6(c)] expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts prior to subjection to any form of penalty for noncompliance."

The Senate Judiciary Committee in its Committee Print of June 1945[24] stated:

> "• • • Subsection (c) is designed to • • • recognize that a private party may contest the validity of an administrative subpoena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The 'haphazard' and often unfair methods of issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's Committee (pp. 124-125, 414-415)."

Section 6(c), quoted in full at p. 27a of the Appendix, provides that the only consequence of judicial enforcement of an agency subpoena or similar process is liability for punishment "for contempt in case of contumacious failure to comply" with the court order of enforcement.

As the House and Senate reports show, the Congressional intent was that no penalties should attach for preenforcement noncompliance, even where the agency process is enforced as issued. Where the agency process is held to be defective and not enforced as issued by the

23. H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) reproduced in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong. 2d Sess. (1946) at p. 265.

24. Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess. (1946), p. 27.

administrative agency, Congress could not have intended that a party should be penalized for seeking judicial review.

In *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), referring to an order to enforce a subpoena under Rule 17 of the Federal Rules of Civil Procedure, this Court said (at p. 221):

> "One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad."

It is significant that in the separate concurring opinion of Circuit Judge Friendly below (which, in effect, expresses a different view from Chief Judge Lumbard regarding the fairness of the exaction of statutory penalties where the recipient of a Commission order has not itself initiated an action for a declaratory judgment or a proceeding under the Administrative Procedure Act) he said:[25]

> "If he [the recipient] prefers to await suit and then succeeds in demonstrating such extensive invalidity that there is no longer an intelligible requirement for an 'annual or special report' he is entitled to prevail. Per contra his utilization of the Declaratory Judgment Act or the Administrative Procedure Act will not avail him if he proves wrong, save, of course, for such periods as the direction has been stayed."

When considering the extent to which the Commission's orders in the instant case were "good" or "bad" within the

25. Appendix, p. 19a.

rule stated in *Bowman* and the "extensive invalidity", as mentioned in Circuit Judge Friendly's concurring opinion below, it is to be kept in mind that only approximately one-third of a total of 360 or more separate questions contained in the Commission's orders issued to petitioner and its former subsidiaries were required to be answered, including questions requiring the production of petitioner's retained file copies of Census Reports to the Census of Manufactures, which petitioner has claimed are privileged, a position sustained in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir. 1960), *cert. denied*, —U. S.—(1960). For further argument on this point see *infra* under Point IV.

It is also significant that, after finding that only one-third of the questions should be enforced, the District Court recognized that it was discretionary whether to dismiss the Government's complaint in its entirety or exercise its powers under Section 6(c) of the Administrative Procedure Act and require answers to the remaining one-third of the questions. The District Court exercised its discretion in favor of partial enforcement in the belief that petitioner would be free of liability for penalties. On this understanding, the District Court felt that it would be "silly"[26] to inconvenience the Commission by requiring it to issue a new order which would omit the "bad" questions. When the Court of Appeals below held, erroneously, in our view, that a "modification" of the Commission's "partially void order * * * carries with it the imposition of penalties for prior noncompliance" the Court compounded its error by failing to remand the case to the District Court so that it could then determine whether, in view of these consequences, it would exercise

26. Record, p. 149.

its discretion in the same way, or remand the matter to the Commission with directions to issue new questions in conformity with the Court's decision.

The Court of Appeals below recognized that the District Court had modified the Commission's order pursuant to Section 6(c) of the Administrative Procedure Act, and had not acted pursuant to section 9 of the FTC Act, as the Government requested. The Court said[27]:

> "Finding authorization to modify enforcement of the orders in §6(c) of the Administrative Procedure Act, 5 U.S.C. §1005(c), Judge Ryan directed that only the enforceable questions be answered. Cf. NLRB *v.* Anchor Rome Mills, Inc., 197 F. 2d 447 (5 Cir. 1952)."[28]

However, when faced with the question whether, because of the substantial defects in the Commission's orders, the District Court had the option, in its discretion, either (a) to dismiss the claim for mandamus or (b), pursuant to the subpoena-enforcing powers granted in Section 6(c) of the Administrative Procedure Act, to modify the order and enforce it as so modified, the Court said[29]:

> "• • • A district judge might believe that the assessment of a forfeiture would be unfair in light of the substantial defects in the agency's order, and might thus be encouraged merely to deny the petition for mandamus thereby forcing the agency to re-issue the valid portions of its order. Whether, as a result of §6(c) of the Administrative Procedure Act, such a total refusal may be sustained is a

27. Appendix, p. 14a.

28. *National Labor Relations Board* v. *Anchor Rome Mills*, cited by the Court of Appeals below, involved a subpoena issued by the NLRB pursuant to Section 11 of the National Labor Relations Act, 29 U.S.C. §161 (1952).

29. Appendix, p. 18a.

> question which hinges on the construction of the word 'subpoena' in the statute, *and we do not decide it here.*" (emphasis added.)

We respectfully submit that the Court of Appeals was forced to decide the question, since the District Court had, in fact, acted pursuant to Section 6(c) of the Administrative Procedure Act and since this decision was a necessary step in determining whether the District Court's action was discretionary. As pointed out above, if the District Court's action was discretionary, then the case should have been remanded to it so that, in exercising its discretion, it could take into account the adverse consequences which, in the view taken by the Court of Appeals, followed from the manner in which its discretion was exercised.

The decision below presents an important question of federal law which has not been, but should be, settled by this Court.

III

The Commission's orders required "answers in writing to specific questions"; the $100 per day forfeiture provision of Section 10 of the FTC Act was, therefore, not applicable.

The questions which petitioner was directed to answer in the order and judgment of the District Court were selected by the District Court from the large number of questions stated in the orders issued by the Commission purportedly under Section 6(b) of the FTC Act. That section authorizes two kinds of requirements. These are (1) a requirement of "annual or special, or both annual and special, reports" and (2) a requirement of "answers

in writing to specific questions". The third paragraph of Section 10 of the Federal Trade Commission Act, which prescribes the $100 per day forfeitures, penalizes only the failure to furnish any "annual or special report". It does not mention "answers in writing to specific questions".

There are clear distinctions between requirements for the furnishing of "annual or special, or both annual and special, reports", on the one hand, and a requirement for "answers in writing to specific questions" on the other. The requirement of the report, presumably, would cover one of the several subjects listed in Section 6(b) *i.e.*, "organization", "business", some particular "conduct", "practices", "management" or some particular "relation" to other corporations, etc. A requirement for a "report" indicates only the general nature of the contents of the report, giving the reporting corporation latitude in determining the specific information to be stated. The corporation is not required to determine the meaning of vague and uncertain questions; nor is it required to determine whether the questions asked require the furnishing of privileged information or are otherwise improper. On the other hand, where "answers in writing to specific questions" are required—as in the case of subpoenas—the recipient of the order has no discretion. It must answer the precise questions put to it. (This was the case with the orders here.)

Except for the form of the process, a requirement of "answers in writing to specific questions" is substantially the same as a subpoena. Indeed, by relying on Section 6(c) of the Administrative Procedure Act, the District Court necessarily held that they were "similar". The consequence of non-compliance with such a requirement should be the same as for non-compliance with a subpoena, and this is precisely what the *first* paragraph of Section

10 of the FTC Act provides.[30] The third paragraph of Section 10 imposes forfeitures only for failure to furnish reports.

The Court of Appeals agreed with petitioner that the $100 per day penalties are not assessable for failure to supply "answers in writing to specific questions". However, commenting that "the line between the two is, by the nature of each quite indistinct", the Court held that the orders in this case required "special reports" and that petitioner was therefore liable for the forfeitures.

If the line between "reports" and "answers in writing to specific questions" were "indistinct", the issue should not have been resolved against petitioner so as to make the forfeiture statute applicable. Forfeiture statutes, being in the nature of penal statutes, should be strictly construed. *United States* v. *One Ford Coach*, 307 U. S. 219, 226 (1939); *Farmers' & Mechanics' National Bank* v.

30. This paragraph provides as follows:

"Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment."

Proceedings under this paragraph may be enjoined in order to permit the recipient to judicially contest the validity of the process, and penalties may not be incurred until a court order of enforcement has been disobeyed, *Federal Trade Commission* v. *Millers' National Federation*, 23 F. 2d 968 (D. C. Cir. 1927); and see *Federal Trade Commission* v. *Millers' National Federation*, 47 F. 2d 428 (D. C. Cir. 1931); see also *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363 (1942) involving a subpoena issued pursuant to Section 9 of the Fair Labor Standards Act (60 Stat. 1095 (1946); 29 U.S.C. §209) which incorporates by reference sections 9 and 10 of the FTC Act.

Dearing, 91 U. S. 29, 35 (1875); *Hannifin* v. *United States*, 248 F. 2d 173 (9th Cir., 1957).

Furthermore, if, *arguendo*, the orders originally issued by the Commission required "reports", after the District Court struck out two-thirds of the questions and made its own order, nothing remained to be answered but a designated series of specific "questions" listed in the Court's order. The Commission's original "orders" had been completely superseded by the District Court's order. As the Court of Appeals for the Ninth Circuit said, in *Flotill Products, Inc.* v. *Federal Trade Commission*, 278 F. 2d 850 (1960), *cert. denied*,—U. S.—(1960) (referring to an order of the district court which had modified a Federal Trade Commission investigative subpoena *duces tecum* and, as modified, enforced it), at page 852:

> "Once the order of the trial court was entered, the hearing examiner's subpoena was superseded and became inoperative and irrelevant."

So far as we are aware, the decision below is the first case holding that the $100 per day forfeiture provision of Section 10 of the FTC Act applies to a subpoena-like list of questions, answerable by mail. The only other decision on this question was conceded by the Court of Appeals below to be to the contrary,[31] *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S.D.N.Y. 1938). The Court chose not to follow Judge Woolsey's decision in that case.

There is presented here a separate, important question of federal law not previously considered by this Court.

31. Appendix, p. 15a.

IV

The decision of this Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950), is not applicable here. This Court did not hold there that the Commission has power under Section 6(b) of the FTC Act to make investigative orders for the purpose of determining whether one of the antitrust acts may have been violated.

The order of the Commission, made pursuant to Section 6(b) of the FTC Act, for the purpose of determining whether Section 7 of the Clayton Act[32] has been violated, was not "authorized by law" as required by Section 6(b) of the Administrative Procedure Act.

Although, so far as we are aware, this Court has not considered the question, the subpoena may be available to the Commission in the performance of its statutory duties to investigate possible violations of the antitrust laws—including Section 7 of the Clayton Act.

The instant case was concededly brought as a "test case"[33] to determine whether the Commission could also resort to the powers under Section 6(b) of the FTC Act for this purpose.

Petitioner's position is that Congress expressly conferred antitrust investigative powers on the Commission in subsections (d) and (e) of Section 6 of the FTC Act

32. 64 Stat. 1125 (1950); 15 U.S.C. §18 (1952).

33. See excerpt from trial transcript, Record, p. 17; see also remarks of Commissioner Tait at page 82 of New Theories of Federal Trade Commission Enforcement, CCH 1960 Antitrust Law Symposium, in which the proposed use of Section 6(b) reports to investigate Robinson-Patman Act violations was described as "ingenious and even revolutionary."

(which require direction by the President or Congress or a request from the Attorney General) and that the omission of such powers in subsection (b) of Section 6 shows a clear intention that power to investigate possible "antitrust" violations is not conferred in subsection (b) under the maxim *expressio unius est exclusio alterius.*[34]

In the court below the government relied primarily on the *dictum* in *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950) that Section 6 could be used for "any purpose within the duties of the Commission, including a §5 proceeding." But *Morton Salt* did not involve an "antitrust" investigation and the Court, in the quoted language, was not focusing on Section 6(b), but was considering the entire Section 6. There the question was whether the Commission could require from Morton a report of compliance with an existing cease and desist order, which had been affirmed by the Court of Appeals in a prior action brought under Section 5 of the FTC Act[35] and whether Morton was committing any new violations of Section 5. Section 5 of the FTC Act is not one of the "antitrust Acts" as defined in Section 4 of the FTC Act.[36] The Commission's investigation in the case at bar involved Section 7 of the Clayton Act, which is one of the "antitrust Acts" as defined in Section 4. Thus the dictum in *Morton* has no application here. The maxim *expressio unius est exclusio alterius* was not applicable in *Morton.*

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34. *Hunt Foods and Industries, Inc.* v. *Federal Trade Commission*, —F. 2d— (9th Cir.) decided December 15, 1960, involved an FTC subpoena issued in an investigation as to whether Section 5 of the FTC Act had been violated. The Court, by way of dictum, referred to Section 6(b) and, without citing any authority, rejected the argument "*expressio unius est exclusio alterius*".

35. 66 Stat. 631 (1952); 15 U.S.C. §45 (1952).

36. 38 Stat. 719 (1914); 15 U.S.C. §44 (1952).

The Court of Appeals below did not agree that *Morton* was distinguishable because it involved a violation of Section 5 of the FTC Act—not one of the defined "antitrust Acts". The Court below said:[37]

> "• • • Since §5 'minimally • • • registers violations of the Clayton and Sherman Acts,' Times-Picayune Publishing Co. *v.* United States, 345 U. S. 594, 609 (1953), the §6 powers are available to the Commission in precomplaint antitrust proceedings as well."

Admittedly, subdivisions (d) and (e) of Section 6 are so available.

But *Times-Picayune* does not destroy the distinction between *Morton*, involving Section 5 of the FTC Act, and the case at bar, which is an investigative proceeding under Section 6(b) to determine whether one of the "antitrust Acts" may have been violated. Merely because every violation of Section 7 of the Clayton Act may also include a violation of Section 5 of the FTC Act, it does not follow that the reverse is true, namely, that every violation of Section 5 of the FTC Act also involves a possible violation of Section 7 of the Clayton Act, or of any other "antitrust Act"; nor does it follow that the Commission's investigative powers relating to the lesser included offense, *i.e.*, a violation of Section 5 of the FTC Act, are available where a possible violation of the greater, embracing offense, *i.e.*, a violation of Section 7 of the Clayton Act, is under investigation.

Congress did not intend that the sweeping investigative power granted to the Commission in Section 5 cases should be available where violations of the antitrust laws are being investigated. A finding of violation of the antitrust

37. Appendix, p. 8a.

laws may lead to much more serious consequences than the cease and desist order which follows from a finding of violation of Section 5 of the FTC Act. Congress provided the investigated party with greater protection where the antitrust laws are involved by providing in Section 6(d) that the "direction" of the President or either House of Congress and in Section 6(e) that the "application" of the Attorney General are conditions precedent to the Commission's power to make such investigations.

In the Task Force Report on Regulatory Commissions, Appendix N (1949), prepared for the Hoover Commission, it was stated, at page 121:

> "Section 6 of the Federal Trade Commission Act gives the Commission wide investigatory powers over the business economy. Its purpose was twofold: (1) to provide general information on corporate practices and relationships as a guide to legislation and public opinion, and (2) upon direction of the President or either House of Congress to report the facts on violation of the antitrust laws by any specific corporation * * *."

The statements in annual reports of the Federal Trade Commission to Congress are to the same effect. See, for example, the Commission's 1959 Report to Congress at page 11.

The Court of Appeals below misreads the legislative history of the FTC Act to support the conclusion that Section 6(b) thereto could be used for antitrust investigations.[38]

We respectfully submit that the Court's discussion of the legislative history proves only, and we agree, that Sections 6(a) and 6(b) of the FTC Act represent the

38. Appendix, pp. 9a to 11a.

re-enactment of the powers formerly exercised by the Bureau of Corporations. As the Court points out, it was Section 9 of the House Bill (H.R. 15613, 63rd Cong. 2d Sess. (1914)) which became Sections 6(a) and 6(b) of the Act.

The Bureau of Corporations, however, never had power to investigate possible violations of the antitrust laws. An entirely new power was incorporated in a separate section of the House Bill, Section 3(c), which provided for investigating possible violations of the antitrust laws, which investigations were to be made when directed by the President or Congress or at the request of the Attorney General. This became Sections 6(d) and 6(e) of the FTC Act.

Clearly, whether the Commission has power under Section 6(b) to investigate possible violations of Section 7 of the Clayton Act is an important question of federal law which has not been, but should be, settled by this Court.

V

This Court should resolve the direct conflict between the decision below and the decision of the Seventh Circuit Court of Appeals in *Federal Trade Commission* v. *Dilger* that file copies of census reports to the Census of Manufactures are privileged.

The facts in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir. 1960), *cert. denied*—U. S.—1960, are identical with the facts relating to census reports in the case at bar, except that in *Dilger* the Commission's process was a subpoena *duces tecum* issued pursuant to Section 9 of the FTC Act, whereas here the specific ques-

tions were required to be answered pursuant to Section 6(b) of the FTC Act. In both cases the same census report forms (Form MC20C) were requested.

The decision of the Court of Appeals for the Seventh Circuit in *Dilger* is, however, in conflict with the decision of the Court of Appeals for the Second Circuit in this case. The Court of Appeals below recognized the conflict. It said:[39]

> "We disagree with the Seventh Circuit decision regarding the same issue in F.T.C. *v.* Dilger, 276 F. 2d 739 (7th Cir. 1960); cert. denied—U. S.—1960."

Here petitioner relies largely on the reasons stated in the opinion of Chief Judge Hastings, writing for a unanimous court in *Dilger*, that file copies of retained census reports are made privileged by Section 9 of the Census Act (68 Stat. 1013 (1954); 13 U.S.C. §9) (which was concurred in by the Bureau of the Census and the Bureau of the Budget[40]).

One of the arguments which was made in *Dilger*, and which petitioner made below, was that the requested information was prepared for and submitted to the Bureau of Census upon assurances of confidentiality from the President, Congress and the Bureau of Census, and that petitioner's file copies were retained in order to prepare subsequent census reports for the convenience of the Government pursuant to the instructions printed across the bottom of the census forms to "Keep This Copy For Your Files".

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39. Appendix, p. 13a.

40. See the statement of the Solicitor General of the United States in the petition for writ of certiorari in that case and the Memorandum for the Secretary of Commerce filed at the request of the Secretary of Commerce by the Solicitor General.

The Court of Appeals below said, in answer to this argument:

> "Although the Census Bureau printed across the bottom of the copy page, 'Keep This Copy For Your Files' there was, in fact, no obligation on the respondents to do so • • •."

This ignores the fact that the Section 5 of the Census Act,[41] specifically authorizes the Secretary of Commerce to prescribe the form of the schedules.

In *United States, ex rel. City of Atlanta, Ga.* v. *Steuart*, 47 F. 2d 979 (D. C. Cir. 1931)[42] the court held (at pages 981-982):

> "• • • the national census is exclusively within the authority of the Congress of the United States, and the Director of the Census has been designated as the administrative agency through which that authority shall be exercised. The director is necessarily invested with discretion in matters of form and procedure when these are not specifically provided for by law • • •."

The Court of Appeals' holding is an open invitation to the business community to discard its file copies of census reports rather than risk having to turn over to other federal agencies material confidentially prepared for and submitted to the Bureau of the Census in reliance upon assurances of confidential treatment. A file copy of a census report is not a record kept in the regular course of business.

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41. 68 Stat. 1013 (1954), 13 U.S.C. §5.

42. See also *United States* v. *Moriarity*, 106 Fed. 886, 891 (2d Cir. 1901); and *United States* v. *Grayson*, 166 F. 2d 863, 870 (2d Cir. 1948) in which it was indicated a privilege could be created by departmental regulation.

The vital work of the Bureau of the Census in preparing economic statistics depends in large measure on the effectiveness of its assurance of confidential treatment. If the Court of Appeals for the Second Circuit is not reversed, the Bureau's work will be seriously encumbered.

The direct conflict in the decisions on the same question of the Seventh and Second Circuits, as pointed out above, is, we submit, a further valid reason for the granting of the writ so that this Court may resolve the conflict and at the same time settle the other important questions of federal law which have not been, but should be, settled by this Court.

VI

Section 6(b) of the Federal Trade Commission Act as applied by the Federal Trade Commission in this case deprives petitioner of its property without due process of law.

The case at bar presents a serious and novel question of constitutional law. As applied by the Commission, Section 6(b) of the FTC Act permits the Commission to issue investigative orders which may not be reviewed unless the recipient of such orders awaits enforcement proceedings, thus running the risk of having to pay forfeitures which accumulate at the rate of $100 per day during the entire period until conclusion of judicial review. In the District Court and in the Court of Appeals petitioner relied on a line of cases holding that a judicial review beset by such obstacles and conducted under such conditions of duress does not amount to due process.

Natural Gas Co. v. *Slattery*, 302 U. S. 300 (1937);
Oklahoma Operating Co. v. *Love*, 252 U. S. 331 (1920);
St. Louis Iron Mountain & Southern Ry. Co. v. *Williams*, 251 U. S. 63 (1919);
Wadley Southern Ry. Co. v. *Georgia*, 235 U. S. 651 (1915);
Missouri Pacific Ry. Co. v. *Tucker*, 230 U. S. 340 (1913);
Ex parte Young, 209 U. S. 123 (1908).

The Court of Appeals below agreed that:

> "• • • If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. Cf. *Oklahoma Operative Co.* v. *Love*, 252 U. S. 331 (1920) • • •."[43]

Whether or not judicial review is so limited depends on whether *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927) is still good law. That case holds that the recipient of a 6(b) order cannot enjoin enforcement thereof, but must await the institution of enforcement proceedings by the Attorney General.

The Court of Appeals has by its decision in the case at bar declared *Claire Furnace* overruled. It held petitioner could have instituted an action for judicial review under the Administrative Procedure Act or Declaratory Judgment Act.[44] The Court observed, however, that:

> "• • • it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds."[45]

43. Appendix, p. 16a.
44. 48 Stat. 955 (1934); 28 U.S.C. §2201 (1952).
45. Appendix, p. 17a.

Prior to the institution of this action, the Commission had advised petitioner's counsel that it would rely on *Claire Furnace* to resist any action instituted by petitioner under the Administrative Procedure Act or Declaratory Judgment Act.[46] While further conferences were being arranged, the instant action was commenced. Petitioner could thus plead the unlawfulness of the Commission's orders under the Administrative Procedure Act only by way of affirmative defense, which it did.[47]

Moreover, throughout this litigation, the Government has taken the position that *Claire Furnace* remains the law and that petitioner had no remedy either under the Administrative Procedure Act or the Declaratory Judgment Act. In the Government's main brief in the Court of Appeals, at page 23, it was said:

> "Since Claire Furnace, which has never expressly been overruled or limited, holds that the enforcement proceedings are such an adequate remedy at law it would appear that review under the Administrative Procedure Act is inapplicable. And this would appear to hold good for the Declaratory Judgment Act, as well, since that statute requires a 'case of controversy'—and as Claire Furnace makes clear, there is no case of controversy before the United States exercises its independent judgment as to whether to bring enforcement proceedings • • • [citing cases]."

More important, the Court of Appeals below was not consistent in its position that Administrative Procedure Act relief was available to petitioner in this case.

In its motion for a stay of the mandate of the Court of Appeals, petitioner requested, as additional relief, that

46. Record, pp. 36, 37.
47. Answer, Para. 14, Record, p. 22.

the Court grant an order pursuant to Section 10(d) of the Administrative Procedure Act postponing the effective date of the Commission's order, thus tolling the forfeitures. Although, as noted above, Chief Judge Lumbard wrote a concurring opinion stating that he would stay the accumulation of penalties for the same period that the mandate is stayed,[48] the majority of the Court failed to take any action with respect to the request. In short, the majority of the Circuit Judges below recognized in their opinion the availability of relief under the Administrative Procedure Act. However, when petitioner requested such relief (in its subsequent motion to postpone the effective date of the Commission's orders pending the conclusion of judicial review in this Court) the Court failed to grant it.

Concurrently with the filing of this petition, petitioner has filed a motion in this Court renewing its application, pursuant to Section 10(d) of the Administrative Procedure Act, for a postponement of the effective date of the Federal Trade Commission's orders until the conclusion of review in this Court. If such motion is granted, petitioner's constitutional objection will have been satisfied, and the argument made in this Point VI may be ignored. On the other hand, if the motion is denied and petitioner does not have a right under Section 10(d) of the Administrative Procedure Act to postpone the effective date of the agency action during the period of judicial review, then petitioner must litigate the validity of the Commission's investigative process under conditions of duress which amount to a denial of due process.

48. Appendix, p. 20a.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

HORACE R. LAMB,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—OCTOBER TERM, 1960.

(Argued September 30, 1960 Decided December 16, 1960.)

DOCKET No. 26413

UNITED STATES OF AMERICA,
Appellant,

v.

ST. REGIS PAPER CO.,
Appellee.

Before—LUMBARD, Chief Judge,
TUTTLE* and FRIENDLY, Circuit Judges.

Cross-appeals from an order of the United States District Court for the Southern District of New York, Sylvester J. Ryan, J., 181 F. Supp. 862, directing that respondent file special reports under §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), and dismissing claim for statutory penalties for default in filing reports.

Affirmed in part and reversed in part.

RICHARD H. STERN, Washington, D. C. (Robert A. Bicks, Assistant Attorney General, Richard A. Solomon, Washington, D. C., S. Hazard Gillespie, Jr., United States Attorney, Southern

* Sitting by designation.

District of New York, Daniel J. McCauley, Jr., General Counsel, Federal Trade Commission, Alan B. Hobbes, Assistant General Counsel, Federal Trade Commission, New York, N. Y., J. B. Truly, Attorney, Federal Trade Commission, Washington, D. C., on the brief), for appellant.

HORACE R. LAMB, New York, N. Y. (H. Richard Wachtel, Douglas W. Hawes, LeBoeuf, Lamb & Leiby, New York, N. Y., on the brief), for appellee.

LUMBARD, Chief Judge:

These are appeals from a judgment of the United States District Court for the Southern District of New York, Ryan, J., in which the court partially enforced nine orders issued by the Federal Trade Commission against the St. Regis Paper Company and seven of its subsidiary corporations directing that special reports be filed and dismissed a claim for statutory penalties brought by the United States against St. Regis. By resolution of January 6, 1959, the Federal Trade Commission instituted an investigation into the acquisition by St. Regis of the stock and/or assets of other corporations engaged in interstate commerce in order to determine whether §7 of the Clayton Act, 15 U. S. C. §18, had been violated. On January 9, 1959, the Commission issued orders to St. Regis in New York City and five of its wholly-owned corporations located in various parts of the country.[1] These orders allowed the addressees thirty days

1. Growers Container Corp. (Salinas, Calif.), F. J. Kress Box Co. (Pittsburgh, Penna.), Pacific Waxed Paper Co. (Seattle, Wash.), Pollock Paper Corp. (Dallas, Texas), Rhinelander Paper Co. (Rhinelander, Wis.).

to respond in writing in a "special report" to questions posed by the Commission and demands for copies of agreements, correspondence, office memoranda, annual reports, schedules, minutes of meetings, accountants' reports, and statistical summaries. St. Regis' motion to vacate the resolution and orders was denied by the Commission on May 6, 1959, and compliance ordered by May 28. On June 4, 1959, the Commission resolved to broaden its investigation to cover the acquisition of two other corporations[2] by St. Regis. Orders dated June 8, 1959 allowed St. Regis and the two subsidiaries thirty days to file special reports similar in content to those requested by the earlier directives.

Upon deciding that the material submitted to it did not meet its demands, the Commission filed notices of default against St. Regis and its subsidiaries on June 18 and July 22. The United States then brought suit in the Southern District of New York under §9 of the Federal Trade Commission Act, 15 U. S. C. §49, asking that a mandatory injunction issue commanding the corporations to file the special reports as requested and that the statutory penalties provided for by §10 be assessed at the rate of $200 per day against St. Regis for its failure to respond to the two orders directed to it. The defendant's motion to strike the second demand on the ground that such relief would be unconstitutional was denied, 24 F. R. D. 366 (S. D. N. Y. 1959), and the case went to trial in the district court on both counts. Judge Ryan held that the Commission had the authority under §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), to order special reports in connection with pre-complaint investigations of possible

2. Cupples-Hesse Corp. (St. Louis, Mo.), Northwest Door Co. (Tacoma, Wash.).

violations of the Clayton Act, §7; that some of the questions posed by the Commission were so vague and uncertain as to be unenforceable; and that the statutory forfeiture could not be invoked to penalize non-compliance with orders which are partially defective. 181 F. Supp. 862 (S. D. N. Y. 1960). The judgment below therefore modified the terms of the original orders insofar as it directed the defendant and its subsidiaries to reply only to those questions held enforceable and dismissed the second count of the government's complaint. The United States appeals from the dismissal, and St. Regis cross-appeals from the part of the judgment granting injunctive relief.

I.

Were we to accept literally the language of §2 of the Expediting Act, 49 U. S. C. §45,[3] we would be required to dismiss these appeals although both parties urge us to hear them. That statute, as amended, provides in terms that in "every civil action" which the United States brings as a plaintiff in the district courts under the Sherman Act,

3. The relevant provisions of the statute as amended to date (56 Stat. 199, 62 Stat. 989) are as follows:

> "That in any civil action brought in any district court of the United States under the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, "An Act to regulate commerce," approved February 4, 1887, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is plaintiff, the Attorney General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance * * *
>
> "Sec. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

Interstate Commerce Act, or "any other Acts having a like purpose" thereafter enacted, appeals from final judgments are to "lie only to the Supreme Court." Both of the instant appeals are from a judgment entered in a civil suit instituted by the United States against various corporations under a statute which contains provisions similar in purpose to those of the Sherman Act.[4] However, we have construed the language of the statute, which as a result of an amendment of 1948 (62 Stat. 989) relates to "every civil action" instead of to "every suit in equity," as including only suits akin to actions in equity. *United States* v. *New York, N. H. & H. R.R.*, 276 F. 2d 525, 543 (2d Cir. 1959). The statutory penalty sought by the United States in its appeal is, indeed, not at all similar to equitable relief. However, this fact alone is not decisive of the question before us. Since the heart of the issue being litigated is the scope of authority delegated to the Commission by Congress, the request for a forfeiture is but auxiliary to the demand for compliance. Thus, even if we were inclined to allow an appeal from one part of a judgment if an appeal from another part of the same judgment would properly lie only to the Supreme Court, we would not consider alone the appeal of the United States in this case. The unseverability of the issues to be decided requires that they all be determined in one action by the tribunal which is to pass on the basic question presented.

4. Not only is any violation of the Sherman and Clayton Acts also a violation of §5 of the Federal Trade Commission Act, *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 609 (1953), but the Federal Trade Commission is expressly authorized by §6 of the Act to investigate antitrust violations and by §7 to act as a "master in chancery" to report on the proper form of an antitrust decree. Moreover, §11 of the Clayton Act, 15 U. S. C. §21, authorizes the Commission to enforce compliance with §7 of the Act.

Nonetheless, we feel that a reasonable construction of the Expediting Act grants this court jurisdiction over appeals such as the one now before us. The writ of mandamus authorized by §9 is, it is true, very much like a mandatory injunction, *cf. Miguel* v. *McCarl*, 291 U. S. 442, 452 (1934), particularly since it is addressed not to some public official or body but to a private corporation.[5] But it would be unreasonable to hold that the type of relief sought here by the Commission or the kind of determination which is to be made on such petitions for mandamus were deemed important enough by Congress to require a clear path from the district court to the Supreme Court of the United States.

Under 15 U. S. C. §45 as it stood before being amended in 1938, 52 Stat. 111, the Federal Trade Commission, to make its order final, was required to bring enforcement proceedings in the Court of Appeals upon learning that the order had been violated, and until 1959 all cease-and-desist orders issued by administrative agencies pursuant to §11 of the Clayton Act, 15 U. S. C. §21, had to be enforced in the same way. See 73 Stat. 243 (1959). Appeals from cease-and-desist orders of the Commission under 15 U. S. C. §§21(g), 45(g) are still taken to the Court of Appeals. Thus, were we to hold that the mandamus provision of §9 brings actions for the enforcement of preliminary requests for information within §2 of the Expediting Act, we would be conceding greater signifi-

5. In *United States* v. *Morton Salt Co.*, 80 F. Supp. 419 (N. D. Ill., 1948), aff'd, 174 F. 2d 703 (7th Cir. 1949), rev'd, 338 U. S. 632 (1950), discussed *infra*, the request sought by the Attorney General under §9 was framed not as a petition for mandamus but as a request for a mandatory injunction. See 80 F. Supp. at 425. The request in this case was similarly phrased.

cance to the early investigatory stages of a Clayton Act proceeding than to the final determination of the enforcing agency. Furthermore, it is only because the Federal Trade Commission Act delegates to the Attorney General, rather than to the Commission, the authority to seek mandamus for compliance with the Commission's orders that the conditions of the Expediting Act, which requires that the United States be plaintiff, is met in this case. The analogue to this provision appeared, as well, in the Interstate Commerce Act of 1887, §20(9), now 49 U. S. C. §20(9). That §2 of the Expediting Act has not been interpreted to cover these mandamus suits is indicated by *United States* v. *Munson S.S. Line*, 33 F. 2d 211 (D. Md. 1929), aff'd, 37 F. 2d 681 (4th Cir. 1930), aff'd, 283 U. S. 43 (1931), in which a suit by the Attorney General under §20(9) was heard first in the district court, then appealed to the Circuit Court of Appeals for the Fourth Circuit, and finally heard on certiorari in the Supreme Court with no discussion whatsoever of the jurisdictional question. In light of the policy objectives of the Expediting Act, we conclude that these proceedings were not to be brought into the class of those entitled to accelerated review merely because the Attorney General had the sole authority to seek their enforcement. Accordingly, we hold that these appeals are properly before this court.

II.

The information requested by the Commission was to be submitted in "special reports" pursuant to §6(b) of the Federal Trade Commission Act, 15 U. S. C. §46(b), which

is set forth in the margin.[6] St. Regis contends that the Commission's authority to require special reports under §6(b) does not extend to antitrust investigations but is limited to discovery of unfair competitive practices under §5 of the Act and violations of court or agency decrees entered under that section.

In *United States* v. *Morton Salt Co.*, 338 U. S. 632 (1950), the Supreme Court upheld a Commission order requiring corporations to file reports showing how they had complied with an earlier order of the Commission. The respondent corporation in that case contended that §6(b) could be used only in aid of the Commission's power to compile information for general economic surveys under §§6(a) and 6(f) and was independent of the enforcement procedures set forth in §5. The court rejected this contention and held that §6 could be used for "any purpose within the duties of the Commission, including a §5 proceeding." 338 U. S. at 649. Since §5 "minimally * * * registers violations of the Clayton and Sherman Acts," *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 609 (1953), the §6

6. Sec. 6

"The Commission shall also have power * * * (b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission."

powers are available to the Commission in precomplaint antitrust proceedings as well.

The respondents here maintain, however, that the statement in *Morton Salt*, insofar as it authorizes antitrust investigations, should be read as referring to §§6(c), (d), and (e) which explicitly delegate to the Federal Trade Commission the following duties: at the behest of the Attorney General to investigate compliance with antitrust decrees; upon the direction of the President or either House of Congress to investigate alleged violations of the antitrust acts; and upon application by the Attorney General to recommend readjustments in the business of any corporation alleged to be violating the antitrust acts. These investigations, when carried out by the use of the usual discovery tools provided for in §9, it is argued, constitute the limit of the Commission's authority with regard to the antitrust acts. The legislative history of the statute, as well as reasonable statutory construction, belie these contentions.

It is clear from the House and Senate reports that the purpose of §6 was to give the Commission the powers with respect to investigating and reporting on antitrust matters that were previously committed to the Bureau of Corporations in the Department of Commerce. In the form first passed by the House[7] §3 of the Act expressly transferred these functions, and §9 required corporations of a minimum size to furnish annual and special reports and such information, statements, and records relating to organization, financial condition, and relation to other corporations as the Commission would require. Section 16 then gave the Commission subpoena powers identical to those given to the Interstate Commerce Commission by the

7. H.R. 15613, 63d Cong., 2d Sess. (1914).

Act of 1887. The report accompanying the Committee draft of the bill, H. R. Rep. No. 533, 63d Cong., 2d Sess. (1914), said that while the investigative powers which had been given to the Bureau of Corporations had been extensive, "there was a failure specifically to require the regular gathering of certain most important kinds of information through the medium of annual reports from industrial corporations engaged in interstate commerce." *Id.* at 2. The report requirement, together with a $100-a-day penalty for default, was therefore incorporated into the then §9. The Senate, in proposing an entirely new draft,[8] authorized the Commission in its §3(b) to require corporations to furnish information and records concerning their business and their relations to other corporations and to produce for examination all papers relating to the commerce in which the corporations under inquiry were engaged. In addition, §3(c) authorized the Commission to require annual and special reports, and §8 gave it the investigative powers possessed by the Interstate Commerce Commission. These powers of investigation were said to be "not greatly in excess of those possessed and for years exercised by the Bureau of Corporations." S. Rep. No. 597, 63d Cong., 2d Sess. 12 (1914). Thus, both versions agreed in giving the Commission power to investigate by requiring annual and special reports as well as by ordering records to be produced.

In conference, however, these powers were merged into §§6(a) and 6(b), and the subpoena power was spelled out in §9.

The House conferees' report said:

> "The Bureau of Corporations is abolished, as in the House Bill, and its powers are conferred on the

8. S. 1460, 63d Cong., 2d Sess. (1914).

> Commission. Instead of transferring them by reference to the original act creating the bureau, as in section 3 of the House Bill, they are explicitly set out in section 6, paragraph (a), of the bill as agreed to by the conferees. This has been done because the bill now gives to the Commission certain powers which so continuously and directly concern the business interests of the country that it is desirable to have the law show on its face its exact extent and application." H. R. Rep. No. 1142, 63d Cong., 2d Sess. 18 (1914).

The report manifests quite clearly Congress' intent to have the Commission assume the powers of the Bureau of Corporations and its expression of that intent in §§6(a) and 6(b).

Moreover, there is no indication in the statute that antitrust investigations are in any way distinguishable procedurally from investigations directed at uncovering violations of the unfair-competition aspect of §5. The detailed enumeration of duties in §§6(c), (d) and (e) neither expressly nor impliedly denies the Commission the power to proceed upon the request of the Attorney General, President, or Congress by use of the powers granted by §6(b); the inclusion of all these provisions within one section of the statute suggests the contrary. And if the Commission may investigate charges of antitrust violations filed by Congress or the President by directing that annual or special reports be filed, it would be anomalous to deny it the use of these same techniques when it is exercising its own obligation under §11 of the Clayton Act to police violations of §7. We therefore hold that the Commission is empowered under §6(b) to require reports with respect to investigations into possible violations of the antitrust laws.

No challenge has been made by the appellants to the scope of the Commission's order, so we do not now undertake to decide whether §6(b) and §9 provide alternative routes or whether only material which cannot be reached by the subpoena power of §9 may be demanded in a §6(b) order.

III.

Among other papers which the Commission directed be produced by St. Regis and its affiliates were copies of various schedules submitted to the Bureau of Census for the 1954 and 1958 Census of Manufactures, the 1955, 1956, and 1957 Surveys of Manufactures, and correspondence relating thereto. The respondents did not contend that copies were not available but maintained instead that ordering their production violated the confidentiality provision of §9 of the Census Act, 13 U. S. C. §9.[9] However, the plain terms of that statute apply only to the Department of Commerce and do not bar any other federal agency from divulging such information if it comes from different sources or from demanding that a copy remaining in the respondent's files be produced. The purpose of the prohibition addressed to the Secretary of Commerce and his staff

9. "Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

"(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit any other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports."

in the Census Act is served if they are denied the power to transmit submitted information to other governmental agencies or to individuals. But there is no reason to protect absolutely the underlying data or to insulate the source of the information from any further inquiry. The manufacturer is under no statutory obligation to hold a copy of his submitted schedule in his files; if he chooses in this way to keep a summary of information which is scattered throughout his records, the particular paper on which the data is collected is no more immune from ordinary discovery procedures than any other document in his possession. Although the Census Bureau printed across the bottom of the copy page, "Keep This Copy For Your Files," there was, in fact, no obligation on the respondents to do so. Clearly the Census Bureau's action cannot confer any immunity on such records through gratuitous suggestion. We agree with the district court that the protection afforded income tax returns under §6103 of the Internal Revenue Code of 1954 presents a close analogy. The originals of such returns are confidential, but copies retained in the taxpayer's files are subject to subpoena. E.g., *United States* v. *O'Mara*, 122 F. Supp. 399 (D. D. C. 1954). We disagree with the Seventh Circuit's decision regarding this same issue in *FTC* v. *Dilger*, 276 F. 2d 739 (7 Cir. 1960), cert. denied, —— U. S. —— (1960).

IV.

We turn now to the question whether, under the circumstances, the statute required the district judge to assess a penalty of $100 against St. Regis for each day on which it was in default in filing the requested reports. The district court decided that although the Commission had the power

to issue the orders, some of the questions propounded and requests made were too vague to be enforced. Finding authorization to modify enforcement of the orders in §6(c) of the Administrative Procedure Act, 5 U. S. C. §1005(c), Judge Ryan directed that only the enforceable questions be answered. Cf. *NLRB* v. *Anchor Rome Mills, Inc.*, 197 F. 2d 447 (5 Cir. 1952). He held, however, that the forfeiture provided in §10 of the Federal Trade Commission Act was "sufficiently analogous to a criminal sanction" to justify applying to it the requirements of clarity and certainty ordinarily demanded of criminal penalties. Since approximately twelve percent of the questions asked in all the orders were held to be vague and uncertain, the district judge refused to assess the $100-a-day penalties demanded by the United States.

The United States appeals only from the refusal to assess penalties and does not dispute Judge Ryan's decision that twenty-eight questions were too vague to be answered. Thus, the only question before us on the appeal of the United States is whether the district court committed error in dismissing the government's claim for statutory penalties.

Were this a case involving a single oversight or an honest mistake in a good-faith attempt to comply with the Commission's order, the statute's absolute and imperative terms would not prevent us from assuming that it could not have been Congress' intent so severely to punish an innocent offender. *United States* v. *Northern Pac. Ry.*, 242 U. S. 190 (1916); see *Kerr S.S. Co.* v. *United States*, —— F. 2d —— (2 Cir. 1960). The facts before us, however, suggest no such mitigating circumstances. The respondents cannot claim that theirs was merely an honest omission since they refused to accede to many of the Commis-

sion's requests for documents and information on the sole ground that the Commission had no authority to demand what was requested. That the respondent's recalcitrance was caused by a wrong guess on a disputed issue of law does not prevent it from being held to "lawful consequences attached to the refusal." *Life & Cas. Ins. Co.* v. *McCray*, 291 U. S. 566, 574 (1934); see *United States* v. *Clyde S.S. Co.*, 36 F. 2d 691 (2 Cir. 1929); *FTC* v. *Maynard Coal Co.*, 22 F. 873 (D. C. Cir. 1927).

The respondents argue, however, that the reports demanded by the Commission in the present case consisted of questions directed at particular information, and that a comparison of §6(b) with §10 discloses that although the Commission is empowered to order the filing of "answers in writing to specific questions" as well as annual or special reports, it is only the failure to file reports which is penalized by §10. In support of this contention we are urged to consider the decision in *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S. D. N. Y. 1938).

The information requested by the Commission is indeed much like that demanded in the *National Biscuit Co.* case, see 18 F. Supp. at 669-70, but it is by no means certain that we would have agreed with the district court's disposition of that case had it been appealed. On the facts of this case we cannot say that the orders directed at St. Regis were requests for "answers to specific questions" rather than demands for reports. The line between the two is, by the nature of each, quite indistinct. Reports that are demanded by the Commission will necessarily be addressed towards more-or-less specific inquiries. A compliance report conveys details concerning activity undertaken pursuant to an order; an investigation report divulges facts concerning suspected violations. It would be totally unreasonable to

withdraw from the Commission the coercive effect of the §10 penalty whenever it makes its wants known in detail but permit it to use the threat of a mounting forfeiture so long as it cloaks the foci of inquiry behind general language. Although it is entirely reasonable to read the statute so as not to fine one who has failed only to respond to one or several specific interrogatories and to remit the Commission to a suit in mandamus for enforcement of such a request, when the quantity of interrogatories reaches the proportions of those in this case and the request is made pursuant to a full investigation of a respondent's course of conduct, the cumulative effect of all the questions is substantially that of a request for a report.

The respondents further urge that infliction of the penalty would violate the due process clause of the Fifth Amendment since they would be unable, under *FTC* v. *Claire Furnace Co.*, 274 U. S. 160 (1927), to test the validity of the order save by awaiting and defending the suit in mandamus, with penalties accumulating all the while. If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. Cf. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920). However, the *Claire Furnace* case was decided before either the Declaratory Judgment Act of 1934, 48 Stat. 955, or the Administrative Procedure Act of 1946, 60 Stat. 237, was enacted. Mr. Justice Jackson, speaking for a unanimous Court in *United States* v. *Morton Salt Co.*, 338 U. S. 632, 654 (1950), intimated broadly that *Claire Furnace* should not stand in the way of declaratory relief or prompt review if that be necessary to rescue the penalty provision from attack under the Fifth Amendment. We hold that

under the declaratory-judgment statute as it now stands, 28 U. S. C. §2201, a proceeding brought to test the validity of an administrative agency's demand for a special annual report, when daily penalties may be assessed for failure to comply with any valid request, amounts to a "case of actual controversy" and is within the jurisdiction of the United States district courts. The respondent bringing such an action would be effectively denied judicial review if he is permitted no forum in which to challenge the validity and scope of the agency's order; his injury, therefore, is immediate enough to warrant judicial intervention even if the agency is not prepared to institute court proceedings to achieve compliance. Since the statute confers discretion on the courts to act when the injury is irremediable, *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237, 241 (1952); *Eccles* v. *Peoples Bank of Lakewood Village*, 333 U. S. 426, 434 (1948), and since the controversy between the parties is clear, and the potential injury to the respondent is evident, the exercise of equitable discretion is appropriate. Moreover, it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds.

We are also of the opinion that a remedy was available to St. Regis under §10(c) of the Administrative Procedure Act, 5 U. S. C. §1009(c). The investigatory order authorized by §6(b) of the Federal Trade Commission Act may not satisfy the statutory definition of "order" in §2(d) of the Administrative Procedure Act, 5 U. S. C. §1001(d), since it may not be a "final disposition." However, the order amounts to a "sanction" under §2(f) since nonperformance of the Commission's demand entails a penalty of $100 a day, and the directive therefore constitutes "compulsory or restrictive action."

The availability of this relief also mitigates the dilemma which our decision here imposes upon district judges. Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, it carries with it the imposition of penalties for prior noncompliance. A district judge might believe that the assessment of a forfeiture would be unfair in light of the substantial defects in the agency's order, and might thus be encouraged merely to deny the petition for mandamus thereby forcing the agency to re-issue the valid portions of its order. Whether, as a result of §6(c) of the Administrative Procedure Act, such a total refusal may be sustained is a question which hinges on the construction of the word "subpoena" in the statute, and we do not decide it here. In view of the opportunity given to a respondent to attack an order requesting a special report by a declaratory-judgment proceeding, the exaction of the statutory penalties for noncompliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, and the order is held valid.

Finally, we agree with Judge Ryan's decision—which the United States has not disputed in its briefs—that only one course of conduct was being investigated and that the second order issued to St. Regis was merely supplementary to the first. Thus, only one penalty of $100 should be assessed for each day of noncompliance.

The judgment below is, therefore, reversed insofar as it dismissed the demand for penalties under §10 of the Federal Trade Commission Act, and the case is remanded with instructions to enter judgment for the United States in the amount of $100 a day for each day on which St.

Regis was in default of the first order requiring a special report.

FRIENDLY, Circuit Judge (concurring):

I join in Chief Judge Lumbard's disposition of the many issues in this case. But I see little basis and less occasion for the statement that the availability of methods for securing an early determination of the validity of a direction under §6(b) of the Federal Trade Commission Act, pursuant to statutes passed long afterwards, necessarily renders exaction of the statutory penalties "fair" in any case where the respondent has not chosen to use them. If he prefers to await suit and then succeeds in demonstrating such extensive invalidity that there is no longer an intelligible requirement for an "annual or special report," he is entitled to prevail. Per contra his utilization of the Declaratory Judgment Act or the Administrative Procedure Act will not avail him if he proves wrong, save, of course, for such periods as the direction has been stayed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—OCTOBER TERM, 1960

DOCKET NO. 26413

UNITED STATES OF AMERICA,
Appellant,

v.

ST. REGIS PAPER CO.,
Appellee.

Before LUMBARD, Chief Judge, TUTTLE and FRIENDLY, Circuit Judges.

The mandate is stayed for a period of 30 days pending application to the Supreme Court of the United States for a writ of certiorari, and subject thereafter to the provisions of Rule 28 (c)(2) of this court; and provided further that should the Supreme Court limit any grant of certiorari to less than all of the issues presented, then the stay of mandate shall automatically dissolve with respect to the issues on which certiorari is not granted.

/s/ Elbert P. Tuttle
(per HJF)

10 January 1961 /s/ Henry J. Friendly

I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed.

/s/ Edward J. Lumbard

Texts of Relevant Statutes

Federal Trade Commission Act

Section 4

38 Stat. 719 (1914); 15 U.S.C. §44 (1952)

"'Antitrust Acts' means the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies', approved July 2, 1890; also sections 73 to 77, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes', approved August 27, 1894; also the Act entitled 'An Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes"', approved February 12, 1913; and also the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914."

Section 5

66 Stat. 631 (1952); 15 U.S.C. §45 (1952)

(Because of its length, this statute has been omitted)

Section 6

38 Stat. 721 (1914); 15 U.S.C. §46 (1952)

"Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the Antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

SECTION 9

38 Stat. 719 (1914); 15 U.S.C. §49 (1952)

"SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of

examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending

under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

* * *"

SECTION 10

38 Stat. 719 (1914); 15 U.S.C. §49 (1952)

"That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corpora-

tion, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be

deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

ADMINISTRATIVE PROCEDURE ACT

SECTION 6

60 Stat. 237, 240 (1946); 15 U.S.C. §1005(b) (1952)

"SEC. 6. Except as otherwise provided in this Act—

• • •

(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(c) SUBPENAS.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the

evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

* * *"

SECTION 10

60 Stat. 237, 243 (1946); 5 U.S.C. §1009 (1952)

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not

directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory

jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

CENSUS ACT

SECTION 5

68 Stat. 1013 (1954); 13 U.S.C. §5 (1954)

"SEC. 5. *Schedules; number, form, and scope of inquiries.*

The Secretary shall prepare schedules, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title."

CENSUS ACT

SECTION 9

68 Stat. 1013 (1954); 13 U.S.C. §9 (1954)

"SEC. 9. *Information as Confidential; exception*

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records."

EXPEDITING ACT

32 Stat. 823 (original text, 1903)

1. "Chap. 544.—An Act To expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any suit in equity pending or hereafter brought in any circuit court of the United States under the Act entitled 'An Act to protect trade and

commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety, 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that hereafter may be enacted, wherein the United States is complainant, the Attorney-General may file with the clerk of such court a certificate that, in his opinion, the case is of general public importance, a copy of which shall be immediately furnished by such clerk to each of the circuit judges of the circuit in which the case is pending. Thereupon such case shall be given precedence over others and in every way expedited, and be assigned for hearing at the earliest practicable day, before not less than three of the circuit judges of said circuit, if there be three or more; and if there be not more than two circuit judges, then before them and such district judge as they may select. In the event the judges sitting in such case shall be divided in opinion, the case shall be certified to the Supreme Court for review in like manner as if taken there by appeal as hereinafter provided.

"SEC. 2. That in every suit in equity pending or hereafter brought in any circuit court of the United States under any of said Acts, wherein the United States is complainant, including cases submitted but not yet decided, an appeal from the final decree of the circuit court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: *Provided*, That in any case where an appeal may have been taken from the final decree of a circuit court to the Circuit court of appeals before this Act takes effect, the case shall proceed to a final decree therein, and an appeal may

be taken from such decree to the Supreme Court in the manner now provided by law."

Approved February 11, 1903.

Section 17 of the Act of June 25, 1948, c. 646, 62 Stat. 989, 15 U.S.C. §29 (1951) amended Section 2 to read as follows:

"SEC. 2. In every civil action brought in any district court of the United States under any of said Acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court."

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IN THE

Supreme Court of the United States

No. [redacted] -47 -61

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

MOTION

HORACE R. LAMB,
Attorney for Petitioner,
15 Broad Street,
New York, N. Y.

IN THE

Supreme Court of the United States

ST. REGIS PAPER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Motion

To: The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, St. Regis Paper Company, respectfully moves, pursuant to Section 10(d) of the Administrative Procedure Act*, for an order postponing the effective date of investigative orders issued by the Federal Trade Commission to petitioner and its former subsidiaries, pending final determination in this Court of petitioner's petition for a writ of certiorari, which is filed concurrently with the filing of this motion. The Commission's orders were the subject of judicial review in the United States District Court for the Southern District of New York (reported at 181 F. Supp. 862) and in the Court of Appeals for the Second Circuit, where judgment affirming the District Court in part and reversing the District Court in part was entered December 16, 1960 (not yet reported in the Federal Reporter, but reported in CCH Trade Regulation Reporter, Paragraph 69,880). The opinion of the Court of Appeals is appended to the petition for writ of certiorari. The opinion of the District Court is in the Record filed in this Court.

* 60 Stat. 243 (1946); 5 U. S. C. §1009(d) (1952).

1. Statement as to Application Previously Made

On December 28, 1960, petitioner moved in said Court of Appeals for an order (1) staying the mandate of that Court and (2) postponing the effective date of the said orders of the Federal Trade Commission which were the subject of judicial review as stated above. On January 10, 1961, the Court of Appeals granted petitioner's motion for the stay of its mandate in an opinion and decision signed by Circuit Judges Tuttle and Friendly, but which did not mention any action on petitioner's second request to postpone the effective date of the Commission's orders.

However, in a separate concurring opinion and decision signed by Chief Circuit Judge Lumbard, it was stated:

> "I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this Court is stayed."

The separate opinions and decisions of the Judges of the Court of Appeals dated January 10, 1961, are appended hereto.

2. Summary History of Case

As more fully shown in the copy of petitioner's petition for writ of certiorari filed in this Court, the instant action was commenced by the United States of America, as plaintiff, for (1) relief in the nature of mandamus, pursuant to Section 9 of the FTC Act,* requiring petitioner to answer in writing approximately 360 separate questions stated in the Commission's orders and (2) to recover forfeitures of $200 per day accumulating from the date of the declarations by the Commission of petitioner's default in answering such questions and continuing

*38 Stat. 722 (1914); 15 U. S. C. §49 (1952).

throughout the entire period of alleged noncompliance with the Commission's orders.

After answer denying liability under both counts of the complaint and asserting various affirmative defenses, including invalidity of the Commission's orders under Section 6(b) of the Administrative Procedure Act,* the action was tried in the District Court by Chief Judge Sylvester J. Ryan on stipulated facts.

The District Court held the Commission's order objectionable in large part and denied the claim for forfeitures, saying, among other things:**

> "Since, however, we hold that the orders on which the Government bottoms its claim for forfeitures are partially defective and since we only enforce those portions of the orders which we find unobjectionable, defendant had a valid reason for challenging these orders as prepared. Therefore, we find the Government has no right to forfeitures under the circumstances."

Acting pursuant to Section 6(c) of the Administrative Procedure Act, the District Court ordered petitioner to answer approximately one-third of the questions contained in the Commission's orders and dismissed the claim for forfeitures. Petitioner complied with all of the provisions of the judgment of the District Court except the questions requiring copies of reports to trade associations and copies of census reports for the Census of Manufactures which were not due until 60 days after the judgment.

On the sixtieth day after the entry of the judgment of the District Court, the Government filed and served a notice of appeal, appealing from only the dismissal of the Government's claim for forfeitures. On receiving the Govern-

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*60 Stat. 240 (1946); 5 U. S. C. §1005(b) (1952).

**181 F. Supp. 862, 868, 869.

ment's notice of appeal petitioner cross-appealed from the portions of the judgment requiring it to answer the questions described above.

The Court of Appeals for the Second Circuit affirmed so much of the District Court's judgment as ordered petitioner to answer the questions designated in the judgment, but reversed the District Court's dismissal of the claim for forfeitures, holding petitioner liable for forfeitures, accumulating at the rate of $100 per day.

3. Reasons for Granting the Motion

Petitioner's motion for a postponement of the effective date of the orders of the Federal Trade Commission which were the subject of review below is made pursuant to the provisions of Section 10(d) of the Administrative Procedure Act. That section provides, in pertinent part, as follows:

> "• • • Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, *every reviewing court* (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings." (Emphasis added.)

When petitioner moved in the Court of Appeals, it was argued by the Government that Section 10(d) may be invoked only when the adversely affected person has affirmatively instituted an action for judicial review of administrative agency action, and that it is not available where agency action is reviewed in defense of an action

brought for judicial enforcement of the action of the administrative agency.

Nothing in Section 10(d), or any other subsection of Section 10 of the Administrative Procedure Act, supports the construction which the Government urged. On the contrary, it is clear from Section 10(b) that the court which entertains an enforcement action brought by the Attorney General pursuant to Section 9 of the Federal Trade Commission Act is a "reviewing court" within the meaning of Section 10(d).

Section 10(b) provides, in pertinent part, as follows:

> "The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute * * * Agency action shall be subject to judicial review in civil or criminal *proceedings for judicial enforcement* except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law." (Emphasis added.)

Whether the person "adversely affected" by agency action is the plaintiff or the defendant, the policy of Section 10(d) is the same, namely, to prevent the person to whom agency action is directed from being adversely affected by such action during the period of judicial review. See the Report of the Committee on the Judiciary which accompanied the bill,* reprinted in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong., 2nd Sess. (1946) (hereinafter "Legislative History"), where it was said, at page 277:

> "The section is in effect a statutory extension of rights pending judicial review, although the reviewing court must order the extension; or, to put the situation another way, statutes authorizing agency

* S. 7, 79th Cong., 1st Sess. (1945).

> action are to be construed to extend rights pending judicial review. * * *"

Having power to grant the relief requested on this motion, we urge that there are compelling reasons why this Court should exercise the power in this case. Unless the effective date of the agency action is postponed, and the $100 per day forfeitures for non-compliance therewith tolled, petitioner will be denied judicial review which meets the statutory standards of fairness, i.e., a review free of the coercive effect of the overhanging, mounting penalties. At the date of the filing of this motion, the accumulated penalties are estimated at the amount of $56,700.

It is also apparent from the legislative history that the statutory requirement that agency penalties be tolled in order to assure adequate judicial review is a restatement of the constitutional rule that agency action which is reviewable only at the risk of paying large forfeitures constitutes a denial of due process. The following is the "Explanation" of Section 10(d) in the Senate Judiciary Committee Print (Legislative History, page 38):

> "The first sentence merely confirms administrative authority to grant a stay. The second sentence authorizes courts to postpone the effective dates of administrative judgments or rules in cases in which, as by subjection to criminal penalties, parties could otherwise have no real opportunity to seek judicial review except at their peril. There is no reason why such a rule should not be recognized as to administrative agencies, since it is applied in the case of legislation of Congress itself. *Cotting* v. *Kansas City Stockyards*, 183 U. S. 79, 101-102; *Ex parte Young*, 209 U. S. 123, 145, 147, 163; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 662; *Chesapeake & Ohio Railway Co.* v. *Conley*, 230 U. S. 513, 521; *St. L. I. M. & So. Ry.* v. *Williams*, 251 U. S. 56, 63; *Oklahoma Operating Company* v. *Love*, 252

> U. S. 331, 337; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160, 172; *Regan* v. *Farmers Loan & Trust Co.*, 154 U. S. 362, 395; *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 417; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19."

Throughout this litigation, petitioner has relied on *Oklahoma Operating Company* v. *Love* and other cases cited by the Senate Committee as authority for its contention that it was being deprived of its property without due process of law, in view of this Court's decision, in *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927), which held that petitioner had to await mandamus proceedings and risk paying substantial forfeitures in order to test the validity of the Commission's orders.

In the instant case, the Court of Appeals held that petitioner's constitutional objection was without merit because, in its view, *Claire Furnace* had been overruled by the subsequent enactment of the Declaratory Judgment Act* and the Administrative Procedure Act and that petitioner had a right to review under those Acts. The Court of Appeals further stated that:

> "* * * it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds. * * *"

The failure of a majority of the Court of Appeals to grant petitioner's motion to postpone the effective date of the Federal Trade Commission's orders, in our view, was clearly inconsistent with its statement that if petitioner had been subject to daily forfeitures during the period of judicial review, "* * * the procedure might not meet the established standards of due process. Cf. *Oklahoma Operating Co.* v. *Love*, *supra*. * * *"

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* 48 Stat. 955 (1934); 28 U. S. C. §2201.

The Court of Appeals rejected petitioner's constitutional argument because of the existence of Administrative Procedure Act remedies; logically it should have granted petitioner's subsequent request for relief under Section 10(d) of that Act.

The majority of the Court of Appeals having denied petitioner's motion in that Court, petitioner has exhausted the possibility of obtaining in the Court below the relief here requested.

As has been shown (*supra*, page 5) Section 10(d) of the Administrative Procedure Act is applicable to cases involving judicial review of administrative action whether the person "adversely affected thereby" is the plaintiff or the defendant.*

In the circumstances, and in view of the fact that the Chief Judge of the Court of Appeals below found merit in petitioner's motion for the relief here requested, it is respectfully submitted that this Court should exercise its powers under Section 10(d) of the Administrative Procedure Act and its inherent equity powers to postpone the effective date of the orders of the Federal Trade Commission, thus tolling the accumulation of possible for-

* Petitioner was defendant in this case because the Government's complaint was served during the course of correspondence and negotiations between petitioner's counsel and the general counsel for the Federal Trade Commission regarding the willingness of the Commission to submit to the jurisdiction of the District Court in an action for a declaratory judgment and other relief to be commenced by petitioner against the Commission (see Record filed with petition for writ of certiorari, pages 36 and 37). The Commission's general counsel advised petitioner's counsel that the Commission would be "constrained to object to the court's jurisdiction", citing *Federal Trade Commission* v. *Claire Furnace Co.*, *supra*. The instant action was commenced several days before a meeting between counsel was to take place.

feitures, pending the conclusion of judicial review in this Court.

Dated February 7, 1961

Respectfully submitted,

HORACE R. LAMB

.....

Horace R. Lamb,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 16—October Term, 1960

Docket No. 26413

UNITED STATES OF AMERICA,

Appellant,

v.

ST. REGIS PAPER CO.,

Appellee.

Before LUMBARD, Chief Judge, TUTTLE and FRIENDLY, Circuit Judges.

The mandate is stayed for a period of 30 days pending application to the Supreme Court of the United States for a writ of certiorari, and subject thereafter to the provisions of Rule 28(c)(2) of this court; and provided further that should the Supreme Court limit any grant of certiorari to less than all of the issues presented, then the stay of mandate shall automatically dissolve with respect to the issues on which certiorari is not granted.

/s/ ELBERT P. TUTTLE
(per HJF)

/s/ HENRY J. FRIENDLY

10 January 1961

I concur, but I would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed.

/s/ EDWARD J. LUMBARD

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 704

ST. REGIS PAPER CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a–19a) is not yet reported. The opinion of the district court (App. 103a–114a)[1] is reported at 181 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1960. The petition for a writ of certiorari was filed on February 7, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the Appendix to the Brief for the United States in the court of appeals, which has been filed with this Court.

STATEMENT

This case arose out of an investigation by the Federal Trade Commission of a series of acquisitions of paper products companies made by the petitioner St. Regis Paper Company, the third largest firm in the paper industry.[1] The purpose of the investigation was to determine whether the effect of the acquisitions may have been substantially to lessen competition or to tend to create a monopoly, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18 (see App. 10a–11a). The Commission began its inquiry on September 7, 1956, by requesting the petitioner voluntarily to submit information concerning its acquisitions made since 1954 (see App. 79a; Ex. 1).[2] After a year of unsuccessful efforts to obtain any substantial part of the information requested on a voluntary basis (App. 79a–82a), the Commission on September 16, 1957, issued a subpoena *duces tecum* calling for documents concerning those acquisitions and three others which had been consummated in the interim (see App. 84a; Ex. 13). The petitioner complied with this subpoena and submitted the subpoenaed documents (App. 84a–97a), which included retained copies of certain census reports (App. 95a–96a).

The Commission thereafter determined that it needed further information for its investigation, and requested voluntary submission of additional docu-

[1] See Standard & Poor's *Industry Surveys*, Sept. 22, 1960, P–8 (production rank). St. Regis has total assets of $450 million and its 1959 net sales amounted to $474 million. Moody's *Industrial Manual* 848–852 (1960).

[2] "Ex." refers to the exhibits to the Stipulation of Facts (App. 79a–102a) which have been certified and lodged with this Court.

ments (see App. 97a). There was considerable correspondence and discussion between the Commission and the petitioner with respect to this additional information, but only a small amount was supplied (App. 97a–99a).

In January 1959, the Commission instituted a formal investigation of the petitioner's acquisitions of paper companies since January, 1954 (App. 10a–11a). On January 9, 1959, it issued six orders which required the submission within 30 days of special reports providing specified information and documents relating to the acquisitions (App. 12a–52a). On June 8, 1959 the Commission broadened its investigation (App. 55a–56a), and issued three additional orders calling for special reports on two further acquisitions (App. 57a–68a).

When the petitioner failed substantially to comply, the Commission issued notices of default with respect to the nine special reports (App. 69a–74a). The effect of these notices was to start the running of the 30-day period after which, under Section 10 of the Federal Trade Commission Act (15 U.S.C. 50), the petitioner would be liable for a forfeiture of $100 per day for each day of default.

The nine orders contained 358 separate requests for information (Br. 40).[3] Prior to the Commission's issuance of the notices of default, the petitioner had answered 52 (15%) of these requests.

On September 15, 1959, approximately three weeks after the statutory penalties had begun to accrue pur-

[3] "Br. refers to the grey-covered brief of the United States in the court of appeals, which has been certified and lodged with this Court.

suant to the notice of default under the second group of orders (App. 72a–74a), the United States instituted a two-count civil action against the petitioner in the district court for the Southern District of New York (App. 2a–9a). The first count sought equitable relief in the nature of mandamus, under Section 9 of the Federal Trade Commission Act (15 U.S.C. 49), to compel the petitioner to comply with the orders directing it to file the special reports (App. 2a–6a). The second count sought recovery of the statutory forfeiture of $100 a day (App. 7a–9a).

As noted, prior to the defaults the petitioner had answered 52 of the 358 requests for information. It answered an additional 72 of them (20%) in a post-trial memorandum in the district court by referring to certain documents it had submitted both before and after the default date; and it answered another 33 requests (9%) for the first time in its post-trial memorandum (Br. 40). Thus, 201 of the requests had not been answered when the district court entered its final judgment.

The district court rejected the petitioner's contention that the Commission had no authority to utilize the special reports procedure of Section 6(b) of the Act as a means of obtaining information in an investigation under Section 7 of the Clayton Act (App. 105a–108a). It held, however, that 43 of the 358 requests for information (12%) were "vague and uncertain" (App. 110a; Br. 12, n. 23), and that the petitioner therefore need not respond to them (App. 112a–113a). The court required answers to the remaining 158 requests "which are enforceable and have not been an-

swered" (App. 112a–113a; Br. 40), including 21 requests (6%) covering retained copies of census reports (App. 108a; Br. 40). Finally, the district court rejected the government's claim for forfeitures. It ruled (App. 114a) that since the orders on which the forfeiture claims were based "are partially defective" and since it was enforcing "only * * * those portions of the orders which we find unobjectionable * * * the Government has no right to forfeitures under the circumstances."

Both parties appealed. The court of appeals upheld the district court's order insofar as it directed the petitioner to submit the special reports (including the furnishing of the retained copies of the census reports) (Pet. 7a–13a), but it reversed the district court insofar as the latter refused to award forfeitures. The court stated (Pet. 14a–15a) that this case involved no "such mitigating circumstances" as "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order." Here the petitioner "refused to accede to many of the Commission's requests for documents and information on the sole ground that the Commission had no authority to demand what was requested." The court further ruled (Pet. 18a) that petitioner could have directly challenged the order requiring the submission of the special reports under either the Declaratory Judgment Act or the Administrative Procedure Act, and that "the exaction of the statutory penalties for noncompliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, and the order is held valid."

DISCUSSION

The petitioner challenges the decision below on three principal grounds.[4] It contends (1) that the Commission cannot use Section 6(b) of the Federal Trade Commission Act to investigate the legality of acquisitions under Section 7 of the Clayton Act; (2) that, in the circumstances of this case, the government had no right to civil penalties for the petitioner's refusal to comply with the orders directing submission of the special reports; and (3) that the Commission had no authority to obtain the petitioner's retained file copies of census reports.

The holding of the court below on the last issue, sustaining the Commission's power to obtain such copies, conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739, certiorari denied, 364 U.S. 882. Since this question is important to the Federal Trade Commission, the Antitrust Division of the Department of Justice, and the Bureau of the Census,[5] we do not oppose certiorari on this issue (the fifth question presented in the petition). We submit, however, that the remaining questions presented do not call for further review.

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[4] The petitioner also questions whether, in view of the Expediting Act, the Government's appeal was properly taken to the court of appeals rather than directly to this Court (Pet. 9–11). We believe that the court of appeals' opinion (Pet. 4a–7a) fully and correctly disposes of this issue, and the parallel question involving its jurisdiction to hear the petitioner's appeal.

[5] See the petition for a writ of certiorari, pp. 14–15, and the memorandum for the Secretary of Commerce, in the *Dilger* case (No. 375, this Term).

1. Section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)) empowers the Commission to "require, by general or special orders, corporations engaged in commerce * * * to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing." We submit that *United States* v. *Morton Salt Co.*, 338 U.S. 632, fully sustains the power of the Commission to utilize its broad § 6(b) powers to obtain information relating to possible Clayton Act violations.

In *Morton Salt*, the Court upheld the power of the Commission to require special reports showing how a corporation had complied with a court of appeals' order enforcing a Commission order under Section 5 of the Federal Trade Commission Act directed against price-fixing. In rejecting the contention that "the reports set forth in § 6 can be required only 'in support of general economic surveys and not in aid of enforcement proceedings under * * * section 5'" (p. 649), the court stated (*ibid.*, emphasis added):

> While we find a good deal which would warrant our concluding that § 6 was framed with the pre-existing antitrust laws in mind, and in the expectation that the information procured

> would be chiefly useful in reports to the President, the Congress, or the Attorney General, *we find nothing that would deny its use for any purpose within the duties of the Commission,* including a § 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of a Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least. The information was such as the Commission was authorized to obtain and we think it could be required for use in determining whether there had been proper compliance with the court's decree in a § 5 case.

If, as *Morton Salt* held, the Commission may use Section 6(b) to obtain information in connection with its "duties" under Section 5 of the Federal Trade Commission Act, it may certainly also do so in connection with its "duties" under the Clayton Act.* The petitioner offers no valid justification for its position that the Commission may utilize Section 6(b) for investigations only under Section 5 of the Trade Commission Act but not under Section 7 of the Clayton Act. Nothing in the broad language of Section 6(b) or, as the court of appeals pointed out (Pet. 9a–11a), in its legislative history, supports petitioner's narrow reading of the statute or its restrictive interpretation of *Morton Salt*—an interpre-

* Conduct that violates the antitrust laws also constitutes an unfair method of competition under Section 5 of the Trade Commission Act. *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 609; *Federal Trade Commission* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395.

tation that is directly contrary to the Court's statement there that Section 6(b) may be used "for any purpose within the duties of the Commission."

2. Section 10 of the Act imposes a forfeiture of $100 a day upon any corporation which fails "to file any annual or special report * * * within the time fixed by the commission for filing the same * * *." In the instant case the district court held that 43 of the 358 requests (12%) were too vague to be enforced. The court, however, held that the 158 remaining requests that had not been answered were valid.[1] As the court of appeals pointed out (Pet. 14a), the petitioner's failure to answer these 158 requests was not the result of "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order," in which event the court indicated it would not have directed the forfeitures. For here the facts "suggest[ed] no such mitigating circumstances" (Pet. 14a), since many of the refusals to submit the information were rested "on the sole ground that the Commission had no authority to demand what was requested" (Pet. 15a). Indeed, the

[1] The petitioner's statements that the district court required it to comply with only one-third of the requests (Pet. 2, 15), and that it invalidated two-thirds of the questions (Pet. 7, 20), give a misleading picture of the facts. As we have shown (see the Statement, *supra*, p. 4), the district court held that 12% of the requests (43) were invalid for vagueness. It directed compliance with 158 requests, which were all the requests that had not been complied with. The reason the court did not direct compliance with the remaining requests was not, as the petitioner implies, because those requests were defective, but because they had already been complied with by the date of its judgment.

petitioner conceded, "[a]dmittedly, most of the questions were reasonably straightforward and were capable of being answered" (see Br. 16). In the circumstances, we submit that the court below correctly held that forfeitures should be awarded, since the fact that the petitioner's "recalcitrance was caused by a wrong guess on a disputed issue of law does not prevent it from being held to 'lawful consequences attached to the refusal' " (Pet. 15a).

The petitioner may not complain because the penalties were imposed in the same judicial proceeding in which the validity of the demands for information was contested and sustained. For, as the court of appeals correctly held (Pet. 16a–18a), the petitioner could have tested the validity of the order before incurring any statutory penalties by proceeding under either the Declaratory Judgment Act or the Administrative Procedure Act. Compare *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654. The petitioner, however, never attempted to seek such immediate review of the orders, but instead elected to wait and contest their validity in a proceeding for their enforcement and for penalties for non-compliance. Plainly, the fact that the petitioner made a "wrong guess on a disputed issue of law" did not deny it due process of law when it was held to the "lawful consequences attached" (Pet. 15a). And, of course, the purpose of the statutory plan imposing a $100-a-day forfeiture for non-submission of reports is to "furnish sufficient inducement to compliance with requests for information" (*United States* v. *Clyde S.S. Co.*, 36 F. 2d 691, 694 (C.A. 2)).

Nor is there any merit to the petitioner's contention (Pet. 15–17) that, because the district court refused to order compliance with the 12% of the requests that were vague, the remainder of the requests, with which compliance was directed, ceased to be orders of the agency and became orders of the court, to which the statutory forfeitures are inapplicable. The various requests were severable. The small number held invalid were not so interrelated to, or dependent upon, the remaining requests as to make the orders directing their submission new orders, merely because they were enforced only in part. What the district court did here was, in substance, no different from what a court does in any case in which invalid but separate portions of an administrative order are eliminated, and the remaining valid part is then enforced.

Finally, there is no basis in the statute for the petitioner's argument (Pet. 17–20) that the forfeitures apply only to failure to submit "special reports," but not to failure to answer specific questions comprising portions of such reports. For, as the court below stated (Pet. 15a–16a), "[i]t would be totally unreasonable to withdraw from the Commission the coercive effect of the § 10 penalty whenever it makes its wants known in detail but permit it to use the threat of a mounting forfeiture so long as it cloaks the foci of inquiry behind general language."

CONCLUSION

We do not oppose the granting of the petition with respect to the fifth question presented. As to all other questions presented, however, the decision below is correct and no substantial question is presented; as to these questions the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
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MARCH 1961.

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FILED
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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

No. [redacted] 47 — 61

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

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ST. REGIS PAPER COMPANY,
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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

Discussion

The Government, in its memorandum in opposition, attempts to describe a large corporation seeking to delay and impede the progress of an investigation, lawfully and properly conducted by the Federal Trade Commission.

The true fact is that this was a case in which the Commission was not only so careless in the drafting of its orders and so unmindful of the rights of the investigated corporations that the bulk of the questions asked by the Commission could not be judicially enforced,[1] but one in which, after such orders were served, the Commission refused either to vacate or modify the orders, so that the

1. Record, p. 14a. "Record", as used herein, has the meaning stated in footnote 1, at page 2, of the petition for writ of certiorari.

numerous errors might be corrected, and denied all of petitioner's requests for conferences with Commission representatives for the purpose of obtaining some modification of the orders by deleting objectionable questions.

Subsequent to the voluntary submission to the Commission of a large volume of information relating to petitioner's acquisitions of the stocks or assets of other corporations and 213 separately marked documents in response to the Commission's subpoena duces tecum in this same investigation,[2] petitioner and its acquired companies were served with 9 separate Commission orders containing a total of 358 separate questions. In petitioner's view, and as the District Court later held, most of these questions were defective because vague and uncertain[3] or duplicative of information previously furnished. In addition, petitioner objected to other questions on the ground that they required the production of privileged records, principally retained file copies of reports to the Bureau of the Census.

Petitioner promptly moved the Commission to have the defects in the Commission's orders corrected. The Commission, however, denied all of petitioner's motions and all of its requests for an opportunity to be heard orally.

In disposing of petitioner's motions, the Commission refused to modify its orders so as to eliminate a single objectionable question. In the Commission's Memorandum Opinion dated May 6, 1959 the Commission recognized

2. Record, pp. 121-134.

3. In our brief in the District Court, we noted that "most of the questions were reasonably straightforward". In every brief of the Government this language has been quoted, as it is in the Government's answering memorandum here, p. 10. Petitioner has never contended that all or even a majority of the questions were vague and uncertain. However, although some were "reasonably straightforward", many of these questions were objectionable on grounds other than vagueness.

that some questions in its orders required duplication of information previously furnished, but nevertheless refused to eliminate them.[4]

After this litigation was commenced, the Government, consistent with the Commission's position, insisted on an "all-or-nothing" compliance, and demanded answers to the entire set of questions, the good as well as the bad. In its brief, in the Court of Appeals, the Government said (at pages 17, 18):

> "It could not be seriously contended that such forfeitures for failure to file required reports could be avoided by a pro-forma filing of a report which patently did not respond to the specific questions propounded therein, or which deliberately refused to answer *some* of the questions. * * *" (Italics ours.)

Thus, in order to test the validity and propriety of questions considered objectionable, petitioner was obliged to refuse to comply with all of the 9 orders as served by the Commission. Petitioner's refusal to comply was, admittedly, not "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order"[5]. It was a deliberate step taken in order to obtain judicial review of the questions claimed to be objectionable.[6] Whether petitioner awaited mandamus proceedings or instituted proceedings under the Declaratory Judgment Act or Administrative Procedure Act, in

4. Record, p. 170.

5. The Government places special emphasis on this observation of the Court of Appeals (see Memorandum in Opposition, p. 9).

6. That petitioner urged, as a separate ground of objection to the Commission's questions, that the Commission was without power to issue the orders did not obviate the necessity to resist enforcement of the entire set of questions in each separate order so that the validity of some of the questions could be judicially determined.

either case, it was necessary to refuse to comply as a condition to judicial review.

The petitioner's non-compliance was in no sense contumacious, but was due to the Commission's refusal to eliminate questions which petitioner, and later the District Court, found objectionable.

The Government's memorandum (at page 5) and the opinion of the Court of Appeals below attempt to give the erroneous impression that petitioner completely ignored the availability of the Declaratory Judgment Act or the Administrative Procedure Act to challenge in the courts the validity of the Commission's orders. Both the Government and the Court below failed to note the correspondence between petitioner's counsel and the Commission which preceded the commencement of this action and in which petitioner's counsel requested the Commission to submit to the jurisdiction of the District Court and answer petitioner's proposed complaint for a declaratory judgment. The written reply of the Commission's general counsel stated:[7]

> "In the event such suit should be filed, you are advised that we would be compelled to note the probable lack of jurisdiction in the Court upon the authority of *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927). See also *Federal Trade Commission* v. *Maynard Coal Co.*, 22 F. 2d 873 (C.A.D.C., 1927)."

The general counsel stated a willingness to discuss the matter at a conference, but before a meeting could be arranged the Government commenced this action.[8] It may also be noted that the Court of Appeals below held,

7. Record, p. 36.
8. Record, p. 22.

for the first time, that *Claire Furnace,* which the Commission's general counsel relied on as authority for the nonavailability of declaratory relief, had been overruled. (See Appendix to petition, pp. 16a, 17a).

The District Court vindicated petitioner's position. District Judge Ryan, after a trial in which all of the Commission's questions were carefully and fully reviewed, found that only 130[9] of the questions were enforceable and that the remaining questions were not required to be answered because they were unreasonably vague or because they had previously been answered in the documents and information furnished the Commission before the Government commenced this action. The Government did not appeal from the portion of the District Court's judgment specifying the questions to be answered.

The Government's memorandum is also inaccurate in its statement as to the time when petitioner had actually answered the questions which the District Court found to be duplicative of information and records previously furnished to the Commission by petitioner. The Government would have it appear that many of the items were answered *after* the service of the Commission's notices of default. For example, at page 4, reference is made to "a post-trial memorandum in the District Court * * * referring to certain documents it had submitted both before and after the default date * * *".[10] The fact is that the only document furnished to the Commission after the service of the notices of default was a copy of petitioner's pro-

9. The specific questions which the District Court ordered answered are listed in the District Court's opinion (Record, p. 150, 181 F. Supp. 862, 868) and in the provisions of the judgment (Record, pp. 152-156).

10. These are in addition to items claimed to have been answered in the "post-trial memorandum" (Memorandum in Opposition, page 4).

spectus dated October 14, 1959 relating to the acquisition by petitioner of the stock of Cornell Paperboard Products Co.[11] This acquisition was not one of those which was the subject of the Commission's investigation, but was furnished voluntarily in petitioner's belief that the Commission should promptly have a proper record of the facts regarding each acquisition made by petitioner and determine promptly whether any such acquisitions presented any question under Section 7 of the Clayton Act.

The 130 questions which were ordered enforced included questions requiring the furnishing of petitioner's retained file copies of census reports. Petitioner unsuccessfully contended before the Commission and in the Courts below that the Commission was without power to require the production of these reports. The Government now recognizes that an important and substantial question of federal law is presented with respect to this particular group of questions and agrees that the writ of certiorari should be granted on the question. It argues, however, that the writ of certiorari should not be granted to review any of the other questions raised in the petition, including the novel, important and substantial question of the Government's right to the forfeitures as claimed.

We respectfully submit that the questions are inextricably related and that the Government's position is unfair and unreasonable.

The relatively small number of the total questions to which the District Court directed that answers be made—including the 21 questions relating to census reports—were, after all, questions for the same investigative purpose as the relatively large number of questions which the District Court eliminated. If these census questions

11. Record, p. 128.

are held to be unenforceable, the proportion of proper questions in this Commission's investigation will have been even further reduced.

The Government takes the position that forfeitures are properly assessable under the third paragraph of Section 10 of the FTC Act because "petitioner made a 'wrong guess on a disputed issue of law'" (Government's Memorandum, p. 10). We urge that most of petitioner's objections were sustained by the District Court and that most of petitioner's "guesses" on the law were correct,—not "wrong".

If petitioner prevails on the right of the Commission to confidential copies of census reports, it will have demonstrated even further that the overwhelming majority of the "wrong guesses" were made by the Commission and not by petitioner. The disposition of the census questions may, therefore, have an important bearing on the question of the Commission's right to forfeitures for the refusal to comply with the Commission's orders.

In its memorandum the Government does not show any valid reasons why the writ of certiorari should not be granted to review the other questions stated in the petition. The Government mentions only three issues (memorandum, p. 6), thereby ignoring entirely the important question concerning the construction and application of Section 6(c) of the Administrative Procedure Act specified in Question 2 (at page 2 of the petition) which this Court has never previously determined.

Moreover, in the District Court the Government frankly took the position that the complaint presented "a test case"[12] brought to obtain a judicial interpretation of the

12. Record, pp. 17, 142. "Record" as used herein is defined in footnote 1 (page 2) of the petition for writ of certiorari.

Commission's investigative (pre-complaint) powers, never previously asserted under Section 6(b) of the Federal Trade Commission Act (181 F. Supp. 862, 864). The Government now retreats from its prior position and urges this Court not to review this novel and important question of federal law, and to confine the review in this Court to the single issue which the Government (having failed to obtain a writ of certiorari in *Federal Trade Commission* v. *Dilger*[13]) now desires to litigate.

Conclusion

The Government's memorandum does not state any persuasive reasons why the petition for the writ of certiorari should not be granted to review all of the questions which this Court has not previously settled. The writ should issue as requested and all the questions stated in the petition should be reviewed and determined by this Court. The settlement in this Court of the issues raised by the petitioner will clarify for the Commission, the federal courts, the Congress and the bar questions which have an important bearing on the proper procedure in pre-complaint investigations by the Commission to determine whether one of the antitrust laws, Section 7 of the Clayton Act, has been violated. Compare pending "pre-merger notification" bill in the present Congress, H.R. 3563, 87th Cong., 1st Sess. (1961); see also bills in previous Congresses, H.R. 10049, 86th Cong., 2d Sess. (1960); H.R. 2325, 86th Cong., 1st Sess. (1959); H.R. 8657, 86th Cong., 1st Sess. (1959).

Respectfully submitted,

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Attorney for Petitioner.

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13. 276 F. 2d 739 (7th Cir. 1960), *cert. denied*, 364 U. S. 882 (1960).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted]47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER ST. REGIS PAPER COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 704

ST. REGIS PAPER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals[1] is reported at 285 F. 2d 607. The opinion of the District Court[2] is reported at 181 F. Supp. 862.

Jurisdiction

The judgment of the Court of Appeals was entered December 16, 1960.[3] The petition for writ of certiorari was filed February 7, 1961 and was granted March 27, 1961.[4] The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[1] R. 218-233.
[2] R. 203-212.
[3] R. 234.
[4] R. 237-238.

Statutes Involved

The statutes involved are: the Federal Trade Commission Act, Sections 6, 9 and 10, 38 Stat. 721, 722 and 723 (1914), 15 U.S.C. §§46, 49 and 50 (1958); the Administrative Procedure Act, Sections 6(b), 6(c) and 10, 60 Stat. 240 and 243 (1946), 5 U.S.C. §§1005(b), 1005(c) and 1009 (1958); and the Census Act, Sections 5, 8 and 9, 68 Stat. 1013 (1954), 13 U.S.C. §§5, 8 and 9 (1958). They are printed in Appendix A *infra*, pp. 1a to 12a.

Questions Presented for Review

The questions arise from an action commenced by the United States (the "Government") for relief against petitioner in the nature of mandamus requiring petitioner to comply with investigative orders of the Federal Trade Commission (the "Commission") and for statutory forfeitures for the prior non-compliance with the Commission's orders. The District Court by order made pursuant to Section 6(c) of the Administrative Procedure Act[3] (a) required petitioner to answer a part (37%) of the questions contained in the Commission's orders, and (b) denied the claim for forfeitures. The Court of Appeals affirmed that portion of the judgment requiring petitioner to answer part of the questions, but reversed the District Court's dismissal of the claim for forfeitures. The questions presented are:

1. Does judicial action under Section 6(c) of the Administrative Procedure Act, modifying administrative agency investigative process, impose upon the recipient of the process liability for forfeitures for non-compliance with the original, unmodified agency process?

[3] 60 Stat. 240 (1946), 5 U.S.C. §1005(c) (1958).

2. Did the orders of the Commission, issued pursuant to Section 6(b) of the Federal Trade Commission Act,[6] constitute a requirement that petitioner furnish "answers in writing to specific questions", rather than a requirement to furnish a "special report", so that the provisions of the third unnumbered paragraph of Section 10 of the FTC Act,[7] providing for forfeitures in the sum of $100 per day for each day of failure to file a "report", have no application?

3. Are petitioner's retained file copies of confidential reports to the Bureau of Census for the Census of Manufactures subject to the investigative processes of the Commission?

4. Does the investigative power asserted by the Commission under Section 6(b) of the FTC Act, if not reviewable except at the risk of paying daily forfeitures accumulating throughout the period of non-compliance, including the period of judicial review, deprive petitioner of its liberty and property without due process of law?

Statement

In September 1956 the Commission sent to petitioner a letter requesting information to determine whether the acquisition by petitioner of the stocks of other corporations was in violation of Section 7 of the Clayton Act.[8] Although petitioner thereafter furnished the Commission a substantial volume of records and documents relating to the acquisitions, the Commission, in September 1957, issued

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[6] 38 Stat. 721 (1914), 15 U.S.C. §46(b) (1958). The Federal Trade Commission Act is hereinafter referred to as the "FTC Act".

[7] 38 Stat. 723 (1914), 15 U.S.C. §50 (1958).

[8] 64 Stat. 1125 (1950), 15 U.S.C. §18 (1958).

a subpoena *duces tecum* to petitioner.[9] Petitioner complied with the subpoena and in the course of hearings held in October, November and December 1957, delivered to the Commission additional documents, records and information constituting 213 separately marked exhibits, many of which were specially prepared to comply with the subpoena. At the final hearing on December 13, 1957, the Commission's attorney before whom the subpoena was returnable stated that all of the specifications of the subpoena had been complied with and declared that the "hearing is terminated".[10]

In June of the following year (1958) the Commission determined that it needed further information for its investigation and requested voluntary submission of additional information.[11] There was considerable correspondence and discussion between the Commission and petitioner with respect to this additional information, including discussion relating to the duplicative and confidential nature of the requested documents and the petitioner's offer to furnish certain information including names of large suppliers and customers by using symbols in lieu of names.[12]

Consequently, although a number of documents were furnished, some of the requested information was not.

In January 1959 the Commission, by resolution, instituted a formal investigation and issued six orders, one addressed to petitioner and five to its wholly-owned subsidiary corporations, setting forth several hundred separate questions to be answered by the addressees.[13]

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[9] R. 109-113.
[10] R. 157.
[11] R. 114-124.
[12] R. 124-162.
[13] R. 9-41.

Petitioner objected to these further requests on the grounds, among others, that they required the duplication of documents and information previously furnished and called for confidential information. Petitioner promptly moved before the Commission to vacate the Commission's orders and for other appropriate relief. Petitioner also requested an opportunity to be heard orally.[14]

After making orders denying petitioner the right to file a brief, in March 1959 the Commission vacated such orders and permitted petitioner to file a written brief limited to the question of duplication of information. The request for oral argument, however, was denied.[15]

In May 1959 the Commission denied petitioner's motion[16] and later denied a further motion for reconsideration.

On June 8, 1959 the Commission issued two more orders requesting answers in writing to questions addressed to two additional subsidiary corporations of petitioner and a third addressed to petitioner.[17]

On June 18, 1959 the Commission issued notices of default for failure to respond to the six January orders,[18] and on July 22, 1959 the Commission issued similar notices of default with respect to the three June orders.[19]

Following the denial of petitioner's application to the Commission to be heard orally, counsel for petitioner made several attempts to meet with Commission representatives in order to work out a reasonable compliance with

[14] R. 166.
[15] R. 168-169.
[16] R. 170.
[17] R. 44-53.
[18] R. 53-55, 175-187.
[19] R. 56-58, 188-191.

the Commission's orders.[20] These offers were rejected until, on September 4, 1959, in answer to the written request of petitioner's counsel for a meeting to discuss petitioner's proposal to commence an action in the district court for a declaratory judgment against the Commission, the Commission's general counsel indicated a willingness to meet with petitioner's counsel but stated that the Commission would object to the court's jurisdiction, citing *F.T.C.* v. *Claire Furnace Co.*, 274 U. S. 160 (1927).[21] On September 17, 1959, before such meeting could be held, the Government commenced this action.

The Government's complaint was stated in two separate counts. The first demanded relief under Section 9 of the FTC Act,[22] which provides for "writs of mandamus", to compel petitioner to comply with the two orders addressed to petitioner and the seven orders addressed to its subsidiaries. The second count demanded forfeitures pursuant to the third paragraph of Section 10 of the FTC Act for each day that petitioner was claimed to be in default of the two orders issued to it. Since the claim was based on two orders, the Government demanded forfeitures accumulating at the rate of $200 per day.[23]

After a trial on stipulated facts before Chief District Judge Sylvester J. Ryan, the greater part of the questions contained in the Commission's orders were held to be improper, in that they were too vague and indefinite or required petitioner to duplicate the "vast amount of information it has supplied."[24] Questions requiring the production of petitioner's file copies of reports for the Census of Manufactures, however, were held to be proper.

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[20] R. 193, 197.

[21] R. 200.

[22] 38 Stat. 722 (1914), 15 U.S.C. §49 (1958).

[23] R. 6.

[24] R. 210-211.

In the Government's brief in the Court of Appeals, copies of which were filed with the Clerk of this Court, there were included, at pages 31-40, tabulations analyzing in detail the contents of all of the nine orders of the Commission and noting the enforcement and enforceability, as well as petitioner's compliance. These tabulations were also summarized in four separate circular graphs, designated Figures 1 to 4, inclusive, at pages 27-30 of the Government's brief. Copies of these graphs are reproduced in Appendix B to this brief.

The graph designated Figure 3 deals with orders 1 and 7, the only orders addressed to petitioner and on which the claim for forfeitures rests. It shows that, according to the Government's figures, 63%[25] of the questions contained in these orders were not enforced and that only 37% were held to be enforceable and enforcement granted, including 3% representing the portion of the total requiring copies of reports for the Census of Manufactures, the confidential treatment of which is one of the questions to be reviewed here.

The District Court did not accede to petitioner's requests at the conclusion of the trial[26] that the matter be remanded to the Commission with directions to issue new orders in conformity with the Court's decision. Instead,

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[25] Comprised of 14% held invalid because vague and uncertain, 16% which had previously been expressly answered, 13% which had been answered by documents previously submitted to the Commission and which had been referred to in petitioner's post-trial memorandum and 20% which petitioner's post-trial memorandum pointed out either (a) had no application to petitioner's business or (b) required "information . . . contained at a certain page of some annual report or prospectus" which petitioner had previously furnished (Government brief in the Court of Appeals, p. 11, footnote 22). These figures are derived entirely from Figures 3 and 4 of the Appendix to the Government's brief in the Court of Appeals, reproduced in Appendix B to this brief.

[26] R. 202-203.

the District Court held that it would adopt a "more practical method of dealing with these orders"[27] by treating the Commission's orders as "subpena[s] or similar process or demand", within Section 6(c) of the Administrative Procedure Act and issued its own orders requiring "compliance with those portions of the orders which are enforceable and have not been answered."[28]

Since the District Court found that petitioner "had a valid reason for challenging these orders as prepared," it denied the Government's claim for forfeitures.[29]

The District Court also held that the Commission had statutory power to issue the orders.

The District Court entered an order and judgment directing petitioner to answer within 30 days all of the "unobjectionable"[30] questions except those requiring copies of reports to trade associations and copies of reports to the Census of Manufactures which were directed to be answered within 60 days.

Petitioner answered fully all questions to be answered in the 30-day period.

On the sixtieth day after the entry of the judgment, the Government served a notice of appeal to the Court of Appeals, appealing only from that portion of the District Court's judgment dismissing the Government's claim for forfeitures.[31] Petitioner thereupon filed a notice of cross-appeal from the portion of the judgment requiring the furnishing of answers to the specific questions set out in the District Court's judgment[32] and moved for a stay and

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[27] R. 210.
[28] R. 211.
[29] R. 212.
[30] R. 212.
[31] R. 217.
[32] R. 216.

suspension of the 60-day requirement of the District Court's order and judgment, which was granted. Subsequently the stay was extended by the Court of Appeals pending its disposition of the appeal.

In its notice of appeal the Government did not appeal from the District Court's refusal to enforce 63% of the questions contained in the two orders addressed to petitioner. The District Court's holding that a large majority of the questions were uncertain or called for information previously furnished is, therefore, not disputed.

Upon review by the Court of Appeals, the District Court's holdings that the Commission had power to issue its orders and that petitioner's retained file copies of census reports were not privileged under the Census Act were affirmed. But the Court of Appeals reversed the District Court's denial of the Government's claim for forfeitures.

Thereafter, petitioner moved the Court of Appeals for a stay of its mandate pending final review by this Court which was granted and which is presently in effect with respect to petitioner's obligation to respond to those questions requiring the furnishing of copies of census reports.[33]

Petitioner also moved in the Court of Appeals, pursuant to Section 10(d) of the Administrative Procedure Act[34] for postponement of the effective date of the Commission's actions until conclusion of judicial review. This motion was denied.[35]

Concurrently with the filing of the petition for a writ of certiorari, petitioner renewed in this Court its motion for an order postponing the effective date of the Commission's actions. The motion was granted "to the extent of

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[33] R. 235.

[34] 60 Stat. 243 (1946), 5 U.S.C. §1009(d) (1958).

[35] R. 235.

tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under §10 of the Federal Trade Commission Act.[36] Petitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation."[37]

SUMMARY OF ARGUMENT

I.

The Court of Appeals erred in holding that the order and judgment of a district court, pursuant to Section 6(c) of the Administrative Procedure Act, modifying partially invalid investigative orders of the Federal Trade Commission carries with it liability for penalties for the non-compliance with the Commission's original, unmodified agency order. The language of Section 6(c) and its legislative history show that invocation of this section by a district court does not result in liability for the non-compliance with the original, partially invalid investigative order of the administrative agency. If, *arguendo*, penalties can be adjudged for such non-compliance, such penalties should be discretionary and not mandatory, and the District Court below, finding that petitioner had a valid reason for resisting the orders, properly exercised its discretion to relieve petitioner of liability.

Moreover, even if the Court of Appeals were correct in holding that penalties for non-compliance with a partially invalid Federal Trade Commission investigative order are not only possible but mandatory when Section 6(c) of the Administrative Procedure Act is invoked by a district court, then, after so ruling, the Court should have re-

[36] 38 Stat. 723, 15 U.S.C. §50 (1958).

[37] R. 238.

manded the case to the District Court to determine whether or not, in the light of these mandatory penalties, the District Court would invoke Section 6(c) and order partial enforcement or would dismiss the action, thus requiring the Commission to issue a new order in conformity with the District Court's findings. From the record in this case, it is clear that the District Court chose modification only as a matter of convenience to the Commission, and it is reasonable to assume the District Court would have ordered dismissal had it known that if it ordered modification such order would also carry liability for penalties.

II.

Section 6(b) of the FTC Act, pursuant to which the Commission issued its orders, authorizes two different kinds of investigative orders, namely, orders requiring "annual or special reports" and orders requiring "answers in writing to specific questions." The statute imposing $100 per day forfeitures refers only to the failure to comply with orders requiring "annual or special reports". As in the case of a Federal Trade Commission subpoena, a failure to furnish "answers in writing to specific questions" is punishable only after a court order of enforcement is entered.

The orders sought to be enforced by the Government in this action did not require a report on a designated subject but consisted of hundreds of specific questions for which written answers were requested, many of which were merely demands for specified documents. Thus, the orders did not require a "special or annual report" and the statute creating liability for $100 per day forfeitures had no application.

Certainly, after the District Court reviewed the questions and made its own order enforcing only 37% of the questions, nothing remained but a series of specific questions for which answers in writing were requested.

III.

Petitioner's retained copies of reports to the Bureau of the Census are entitled to the same confidential treatment as the original copies of census reports furnished to the Bureau. The language of the Census Act, a presidential proclamation and the schedules themselves, published pursuant to congressional delegation of authority to the Department of Commerce to prescribe the form of the schedules, all compel this conclusion. The Court of Appeals' analogy to cases holding that retained copies of income tax returns are not entitled to confidential treatment is fallacious. The income tax cases are based on a section of the Internal Revenue Code which provides that income tax returns may be inspected upon the order of the President. The Census Act contains no such provision.

In *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir.), *cert. denied*, 364 U. S. 882 (1960) the Court of Appeals for the Seventh Circuit considered this analogy and rejected it, holding that retained copies of the reports to the Bureau of the Census were confidential and not amenable to Commission investigative process. The memorandum for the Secretary of Commerce submitted in opposition to the petition for certiorari in *Dilger* indicates that the opinion in *Dilger* reflects a careful consideration of the language and purposes of the confidentiality provisions of the Census Act, neither of which were considered in the opinion below.

IV.

The recipient of a Federal Trade Commission investigative order can test the validity of the order only by awaiting mandamus proceedings brought by the Government, *Federal Trade Commission* v. *Claire Furnace Co.*,

274 U. S. 160 (1927). Where the mandamus proceedings are joined with a claim for statutory forfeitures under the third (unnumbered) paragraph of Section 10 of the FTC Act, the recipient of the order can obtain judicial review only at the risk of having to pay forfeitures accumulating at the rate of $100 per day throughout the entire period of judicial review in the event his objections are not sustained. This Court has held many times that judicial review conducted under such conditions is a denial of due process of law.

The Court of Appeals below erroneously held that the subsequent enactment of the Declaratory Judgment Act and the Administrative Procedure Act had vitiated the rule of *Claire Furnace* and that, accordingly, petitioner could have protected itself from a claim for forfeitures by taking action under those Acts.

If *Claire Furnace* has been overruled, and petitioner could have taken action under the Administrative Procedure Act, then the Court below erred in denying petitioner's motion under the Administrative Procedure Act for a postponement of the effective date of the Federal Trade Commission's order. On the other hand, if *Claire Furnace* has not been overruled, then, as the Court of Appeals acknowledged, the forfeiture sanction cannot "withstand attack on due process grounds."[38]

[38] R. 232.

ARGUMENT

I

The District Court, having exercised power under Section 6(c) of the Administrative Procedure Act to enforce only so much of an administrative agency's investigative process as it found "to be in accordance with law", was not required to impose penalties for non-compliance prior to judicial review.

In Count One of the complaint the Government claimed relief in the nature of mandamus[39] under Section 9 of the FTC Act to compel compliance with the nine Commission orders.[40]

Because a large part of the orders were defective, the District Court did not grant such relief. In order to avoid the delay and inconvenience attendant upon a dismissal of the action and the issuance of new Commission orders, the District Court treated the Commission orders as a "subpena" or other "similar process or demand" under Section 6(c) of the Administrative Procedure Act which permits judicial modification and enforcement of a partially void administrative "subpena or similar process or demand."[41] The Court issued its own order which

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[39] Although writs of mandamus were abolished by Rule 81(b) of the Federal Rules of Civil Procedure, the principles which apply in determining whether relief in the nature of mandamus should be granted were not changed by the Rule. *Hammond* v. *Hull*, 131 F. 2d 23 (D.C. Cir. 1942), *cert. denied*, 318 U. S. 777 (1943); *Securities and Exchange Commission* v. *Morgan, Lewis & Bockius*, 113 F. Supp. 85 (E.D. Pa. 1953), aff'd on other grounds, 209 F. 2d 44 (3d Cir. 1953).

[40] R. 1.

[41] The text of the section in relevant part is as follows:

> ". . . Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

modified and, as modified, enforced parts of the Commission's orders. The Court said:[42]

> "Defendant urges that having found portions of the orders indefinite, we must strike down the entire set. From a practical point of view, this seems silly since it would require the Commission to redraw and reissue the same orders. We believe that ordering partial compliance is a more practical method of dealing with these orders and feel that Section 6(c) of the Administrative Procedure Act, 5 U.S.C.A. 1005 (c), affords us ample legal authority to modify these orders. (Cf. *N.L.R.B.* v. *Anchor Rome Mills*, 197 F. 2d 447; *F.C.C.* v. *Cohn*, 154 F. Supp. 899.)"

The District Court dismissed the forfeiture claim in Count Two of the complaint, holding that since many of the questions contained in the Commission's orders were objectionable, petitioner should not be penalized for resisting the orders in their original form, saying:[43]

> "• • • the orders on which the Government bottoms its claim for forfeitures are partially defective and since we only enforce those portions of the orders which we find unobjectionable, defendant had a valid reason for challenging these orders as prepared. Therefore, we find the Government has no right to forfeitures under the circumstances."

The Court of Appeals recognized that mandamus had not been granted and that, in the exercise of judicial power under Section 6(c) of the Administrative Procedure Act, the District Court had issued its own order.[44] Neverthe-

[42] R. 210.
[43] R. 212.
[44] R. 229.

less the Court of Appeals reversed the District Court's denial of forfeitures, holding that where partial enforcement power under Section 6(c) is exercised by a court, penalties must be adjudged for the recipient's non-compliance with the original, unmodified subpoena or similar process or demand during the period prior to and during judicial review. Without citing any authority the Court of Appeals said:[45]

> "Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, *it carries with it the imposition of penalties for prior non-compliance.*" (Emphasis supplied.)

The legislative history shows that the intent of Congress was exactly the opposite.

The House Report[46] stated:

> "• • • • The Section [6(c)] expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts *prior to subjection to any form of penalty* for non-compliance." (Emphasis supplied.)

The Senate Judiciary Committee in its Committee Print of June 4, 1945[47] stated:

> "• • • Subsection (c) is designed to • • • recognize that a private party may contest the validity of an administrative subpoena issued against him *prior to incurring penalties* for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search

[45] R. 232.

[46] H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) reproduced in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong. 2d Sess. (1946), at p. 265.

[47] Administrative Procedure Act, Legislative History, S. Doc. 248 79th Cong. 2d Sess. (1946), p. 27.

> or seizure involved. The 'haphazard' and often unfair methods of issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's Committee (pp. 124-125, 414-415)." (Emphasis supplied.)

The section itself plainly provides that the only consequence of judicial enforcement of an agency subpoena or similar process is liability for punishment for contempt in case of contumacious failure to comply with the court order of enforcement. Long prior to the enactment of the Administrative Procedure Act, this Court held that an administrative agency had no power to punish non-compliance with its subpoena, and that penalties could not result from such non-compliance until a court held the subpoena valid, *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 477, 485, 489 (1894).

As the House and Senate reports show, the Congressional intent in enacting Section 6(c) of the Administrative Procedure Act was that no penalties should attach for pre-enforcement non-compliance, even where the agency process is not defective and is enforced as issued. Where the agency process is held to be defective and is not enforced as issued by the administrative agency, Congress did not intend that a party should be penalized for seeking judicial review.[48]

In *Bowman Dairy Co.* v. *United States*, 341 U. S. 214 (1951), referring to an order to enforce a subpoena under Rule 17 of the Federal Rules of Civil Procedure, this Court said, at page 221:

> "One should not be held in contempt under a subpoena that is part good and part bad. The burden

[48] Section 6(b) of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. §1005(b), also declares the congressional intent that no agency "process, requirement of a report, inspection, or other investigative act or demand shall be . . . enforced in any manner or for any purpose except as authorized by law."

> is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad."

When considering the extent to which the Commission's orders in the instant case were "good" or "bad" within the rule stated in *Bowman* it is to be kept in mind that the District Court held only 37% of the questions contained in the orders addressed to petitioner were required to be answered, including questions requiring the production of petitioner's retained file copies of Census Reports to the Census of Manufactures, which petitioner claims are privileged. (See *infra* under Point III.)

Following its statement that the order of the District Court modifying and enforcing partially void Commission orders carried with it penalties for non-compliance prior to judicial review, there is additional language which indicates that the Court of Appeals ignored certain of the uncontested conclusions of the District Court. The Court of Appeals also said:[49]

> "• • • A district judge might believe that the assessment of a forfeiture would be unfair in light of the substantial defects in the agency's order, and might thus be encouraged merely to deny the petition for mandamus thereby forcing the agency to re-issue the valid portions of its order. Whether, as a result of §6(c) of the Administrative Procedure Act, such a total refusal may be sustained is a question which hinges on the construction of the word 'subpoena' in the statute, and *we do not decide it here.*" (Emphasis supplied.)

The Court appears to be saying that if the word "subpena" in Section 6(c) includes a Federal Trade Commission investigative order, then a district court which

[49] R. 232.

finds such an order to be substantially defective cannot deny mandamus and dismiss the Government's action, but must enforce the valid portion under Section 6(c) of the Administrative Procedure Act. However, the Court of Appeals said, whether a Federal Trade Commission investigative order is included within the word "subpena", as used in Section 6(c), is a question which need not be decided in this case.

The Court of Appeals overlooked the fact that the District Court had decided the question. The District Court did not grant mandamus. By exercising power under Section 6(c) of the Administrative Procedure Act to modify and partially enforce the Commission's orders, the District Court necessarily held that the Commission's investigative orders were "subpenas or similar process or demand" for the purposes and within the terms of Section 6(c).

By its affirmance, the Court of Appeals must have accepted the District Court's characterization of the Commission's orders as "subpenas or similar process or demand" to find authority in Section 6(c) for the partial enforcement.

If, as the District Court expressly held and the Court of Appeals impliedly holds, a Federal Trade Commission investigative order is the equivalent of a "subpena" as that term is used in Section 6(c) of the Administrative Procedure Act, and if modification and enforcement of a "subpena or similar process or demand", pursuant to Section 6(c), carries with it penalties for prior non-compliance, then statutory forfeitures will be payable as a result of non-compliance with any partially enforced Commission investigative order, irrespective of the extent of its invalidity.

The Court of Appeals' effort to escape this harsh result by leaving open the question whether Federal Trade Com-

mission investigative orders are "subpenas" within the meaning of Section 6(c) was without effect, since that question had already been decided by the District Court.

The next sentence in the Court's opinion, which concludes the paragraph, again suggests that the Court of Appeals had overlooked the uncontested findings of the District Court. The Court said:[50]

> "* * * In view of the opportunity given to a respondent to attack an order requesting a special report by a declaratory-judgment proceeding, the exaction of the statutory penalties for non-compliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, *and the order is held valid.*" (Emphasis supplied)

If, as the Court assumed, a recipient of a Federal Trade Commission investigative order could be liable for forfeitures prior to judicial review, then it would be true that failure to initiate review proceedings and obtain a stay would expose him to liability for penalties if he is wrong and the Commission's order is found valid.

But this is not a case where the Commission's orders were found "valid". Sixty-three percent (63%) of the questions addressed to petitioner were not enforced by the District Court; and the Government did not appeal from that finding. Thus, where, as here, the Commission's order is substantially defective, whether or not the recipient thereof instituted declaratory judgment proceedings and obtained a stay has no relevancy. Certainly, failure to obtain a stay should not be a reason for punishing a recipient for failing to comply with Commission orders which are found to have been substantially invalid.

[50] R. 232-233.

In the separate opinion of Circuit Judge Friendly, it was said, among other things:[51]

> "• • • I see little basis and less occasion for the statement that the availability of methods for securing an early determination of the validity of a direction under §6(b) of the Federal Trade Commission Act, pursuant to statutes passed long afterwards, necessarily renders exaction of the statutory penalties 'fair' in any case where the respondent has not chosen to use them. If he prefers to await suit and then succeeds in demonstrating such extensive invalidity that there is no longer an intelligible requirement for an 'annual or special report,' he is entitled to prevail. Per contra his utilization of the Declaratory Judgment Act or the Administrative Procedure Act will not avail him if he proves wrong, save, of course, for such periods as the direction has been stayed."

Additional support for the proposition that the Court of Appeals dealt with the forfeitures question without considering certain of the uncontested findings of the District Court is found in the Court of Appeals' comment:[52]

> "• • • The respondents cannot claim that theirs was merely an honest omission since they refused to accede to many of the Commission's requests for documents and information *on the sole ground that the Commission had no authority to demand what was requested.* That the respondent's recalcitrance was caused by a wrong guess on a disputed issue of law does not prevent it from being held to 'lawful consequences attached to the refusal'." (Emphasis supplied.)

The fact is that one of petitioner's principal objections to the original, unmodified orders was that they were

[51] R. 233.
[52] R. 230.

improper because they required the duplication of information previously furnished and that all of such objections were sustained by the District Court. Petitioner's "guesses" on issues of law were not "wrong".

It is petitioner's position that where an FTC investigative order is not enforced as issued, but, instead, is partially enforced by a District Court order made pursuant to Section 6(c) of the Administrative Procedure Act, the clear direction of the statute is that the party against whom such order is issued is not liable for any penalty unless and until the court order is disobeyed. If, however, it should be held that penalties for non-compliance prior to review are possible, we submit that the assessment thereof should not be mandatory, but should be discretionary with the District Court. Here the District Court exercised its discretion to declare petitioner not liable for penalties. For this reason alone, we respectfully submit, a reversal of the Court of Appeals' determination of petitioner's liability for forfeitures is fully warranted.

Furthermore, even if, *arguendo*, the Court of Appeals were correct in its holding that partial enforcement of an agency investigative order, pursuant to Section 6(c) of the Administrative Procedure Act, necessarily "carries with it" liability for penalties for prior non-compliance, the Court of Appeals should have remanded the case to the District Court in order to give that Court an opportunity to determine whether, in light of these adverse consequences (of which the District Court was unaware at the time it ordered partial enforcement), the District Court would order partial enforcement or dismiss the action and remand the matter to the Commission for further proceedings.

If the District Court were given the option either to grant partial enforcement with penalties or to dismiss and remand the action, thus requiring the Commission to issue orders in conformity with the Court's decision, it is

reasonable to assume, on the record here, that the District Court would have elected the latter course. The failure to remand turns on the Court of Appeals' erroneous holding that not only is the assessment of penalties mandatory when Section 6(c) is invoked, but that invocation of Section 6(c) is itself mandatory if any portion of the agency order, however slight, is enforceable, leaving no discretion for the trial court to dismiss the action and require a new Commission order.

II

The Commission's orders required "answers in writing to specific questions"; the $100 per day forfeiture provision of Section 10 of the FTC Act was, therefore, not applicable.

Section 6(b) of the FTC Act, under which the Commission issued its orders authorizes two different kinds of requirements: (1) "annual or special, or both annual and special, reports" and (2) "answers in writing to specific questions".

The third (unnumbered) paragraph of Section 10 of the FTC Act prescribes $100 per day forfeitures for the failure to furnish an "annual or special report". There is no such forfeiture provision for failure to furnish "answers in writing to specific questions". The sanction for that method of eliciting information, as we show below, is provided elsewhere in the Act.

There is a basic distinction between a requirement for the furnishing of "annual or special • • • reports" and a request for "answers in writing to specific questions". A requirement for a "report" indicates only the general nature of the contents of the report, giving the reporting corporation latitude in determining the specific information to be stated. It would presumably cover one of the several subjects listed in Section 6(b),

e.g. "organization", "business", some particular "conduct", "practices", "management" or a particular "relation" to other corporations. The reporting corporation is not required to deal with specific questions and is not required to determine the meaning of questions which it finds vague and uncertain or are otherwise improper.

Where "answers in writing to specific questions" are required—as in the case of subpoenas and similar process —the recipient of the order has no discretion. It must answer the precise questions stated.

Thus, except for the form of the process, an order requiring "answers in writing to specific questions" is substantially the same as a subpoena *duces tecum*. Indeed, by relying on Section 6(c) of the Administrative Procedure Act, the District Court necessarily equated the two. The problems of the recipient with respect to each are the same. The consequence of non-compliance should therefore be the same, and this is what the first (unnumbered) paragraph of Section 10 of the FTC Act provides.[53]

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[53] This paragraph reads as follows:

> "Any person who shall neglect or refuse to attend and testify, *or to answer any lawful inquiry* or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000 or by imprisonment for not more than one year, or by both such fine and imprisonment." (Emphasis supplied.)

Proceedings under this paragraph may be enjoined in order to permit the recipient to contest judicially the validity of the process, and penalties may not be incurred until a court order of enforcement has been disobeyed, *Federal Trade Commission* v. *Millers' National Federation*, 23 F. 2d 968 (D.C. Cir. 1927); and see *Federal Trade Commission* v. *Millers' National Federation*, 47 F. 2d 428 (D.C. Cir. 1931); see also *Cudahy Packing Co.* v. *Holland*, 315 U. S. 357, 363 (1942) involving a subpoena issued pursuant to Section 9 of the Fair Labor Standards Act (52 Stat. 1065 (1938), 29 U.S.C. §209 (1958) which incorporates by reference sections 9 and 10 of the FTC Act. See also *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 217 (1946).

The Court of Appeals, although recognizing that there is a difference between a requirement of a report and a request for "answers in writing to specific questions" said:[54]

> "On the facts of this case we cannot say that the orders directed at St. Regis were requests for 'answers to specific questions' rather than demands for reports. *The line between the two is, by the nature of each, quite indistinct.* • • •" (Emphasis supplied.)

It held that the orders in this case required "special reports" and that petitioner was therefore liable for the forfeiturers.

If, as held, the line between "reports" and "answers in writing to specific questions" is "quite indistinct", the issue should not have been resolved against petitioner so as to make the forfeiture statute applicable. Forfeiture statutes, being penal in nature, should be strictly construed. *United States* v. *One Ford Coach*, 307 U. S. 219, 226 (1939); *Farmers' & Mechanics' National Bank* v. *Dearing*, 91 U. S. 29, 35 (1875); *Hannifin* v. *United States*, 248 F. 2d 173, 175 (9th Cir. 1957).

Furthermore even if, *arguendo*, the orders originally issued by the Commission required "reports", after the District Court struck out 63% of the questions and made its own order, nothing remained to be answered but a designated series of specific "questions" listed in the Court's order. The District Court said:[55]

> "St. Regis in its answer to the specifications takes great pains to point out the vast amount of information it has supplied for which the Commission

[54] R. 230.

[55] R. 210-211.

> gives no credit. After reading the answer, we saw merit in defendant's contention and found it necessary to go over the entire situation and come to our own conclusions as to what was answered by defendant, making use of the material supplied by St. Regis in its answer."

The Commission's original "orders" were completely superseded by the District Court's order. In *Flotill Products, Inc.* v. *Federal Trade Commission*, 278 F. 2d 850 (9th Cir.), *cert. denied*, 364 U. S. 891 (1960), referring to an order of the District Court which had modified a Federal Trade Commission investigative subpoena *duces tecum*, and, as modified, enforced it, the Court of Appeals said, at page 852:

> "Once the order of the trial court was entered, the hearing examiner's subpoena was superseded and became inoperative and irrelevant."

In any event, whether a court order or a Commission order, the resultant listing of hundreds of questions to be answered provided no resemblance to an "annual or special report" to which the statutory authority for $100 per day forfeitures relates.

So far as we are aware, the decision below is the first case holding that the $100 per day forfeiture provision of the third paragraph of Section 10 of the FTC Act applies to such a request for written answers to specific questions. The only other decision on this question was conceded by the Court of Appeals below to be to the contrary, *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S.D. N.Y. 1938). The Court chose not to follow District Judge Woolsey's decision in that case. We submit that was error. There is little practical difference between a requirement for answers in writing to specific questions and a subpoena *duces tecum*, particularly where,

as in the instant case, a large part of the "questions" are really demands for documents.[56] They should both be enforced in the same manner.

III

Petitioner's retained file copies of reports to the Bureau of Census for the Census of Manufactures are not subject to the investigative process of the Federal Trade Commission.

The question whether retained copies of reports to the Bureau of the Census are amenable to the process of the Federal Trade Commission presents a square conflict between the circuits for resolution by this Court.

In *Federal Trade Commission* v. *Dilger*,[57] the Court of Appeals for the Seventh Circuit held that copies of such reports were beyond the reach of Federal Trade Commission process. Although the Solicitor General refused to sign the petition, the Commission petitioned for writ of certiorari without his approval. The Secretary of Commerce filed a memorandum in opposition. This Court denied the writ (No. 375, October Term, 1960).

The Court of Appeals below, however, expressly rejected the holding of *Dilger*.

We urge that the rule stated by the Court of Appeals for the Seventh Circuit is the correct rule and that this Court should reject the view expressed by the Court of Appeals below.

The statutory basis for the confidential treatment to be accorded copies of census reports is found in Sections 8 and 9 of the Census Act.[58]

Section 9 contains a general restriction on the use and publication of data furnished by any reporting person or

[56] See for example Question 1(a) of Order No. 1, R. 9.

[57] 276 F. 2d 739 (7th Cir.), *cert. denied*, 364 U. S. 882 (1960).

[58] 68 Stat. 1013 (1954), 13 U.S.C. §§8 and 9 (1958).

corporation. Section 8 contains the exceptions to the general prohibition and provides in subsection (c) thereof as follows:

> "In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates."

Section 5 of the Census Act[59] confers broad authority upon the Department of Commerce to prescribe the form of the schedules.

The form of the report for the Census of Manufactures shows upon its face that it is a form originating with the Census Bureau. It states the following:

> "CONFIDENTIAL—This report should be returned WITHIN 30 DAYS OF ITS RECEIPT. This report is authorized by Act of Congress (13 U.S.C. 131) which requires that you file a report. Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation, or regulation."

Across the bottom of the copy to be retained by the reporting manufacturer is the following legend, printed in bold type:

"KEEP THIS COPY FOR YOUR FILES"

In addition to the assurances of confidentiality contained in the statutes and in the forms issued pursuant to the Department's power to prescribe forms, similar pledges have been made in a presidential proclamation and in an opinion of the Attorney General. Thus a presidential proclamation dated November 22, 1929[60] contained the following statement:

> "The sole purpose of the Census is to secure general statistical information regarding the popu-

[59] 68 Stat. 1013 (1954), 13 U.S.C. §5 (1958).
[60] 46 Stat. 3011, 3012.

lation and resources of the country, and replies are required from individuals only to permit the compilation of such general statistics. No person can be harmed in any way by furnishing the information required. The Census has nothing to do with taxation, with military or jury service, with the compulsion of school attendance, with the regulation of immigration, or with the enforcement of any national, state, or local law or ordinance. There need be no fear that any disclosure will be made regarding any individual person or his affairs. For the due protection of the rights and interests of the persons furnishing information every employee of the Census Bureau is prohibited, under heavy penalty, from disclosing any information which may thus come to his knowledge."

See also 36 Ops. Atty. Gen. 362 (1930).

Against this background the Court of Appeals for the Seventh Circuit in *Dilger* unanimously held that the privilege attaches to the copies of the reports retained by the reporting corporation as well as to the original report submitted to the Census Bureau. In the opinion by Chief Judge Hastings the Court said (276 F. 2d 739, at p. 743):

"The Commission argues that the foregoing documents relate solely to information in the possession of the Census Bureau and to disclosure by officials and employees of that Bureau. It contends they have no application to retained copies in the custody of the informant. In effect, the Commission concedes that it could not enforce a subpoena against the Census Bureau and require the production of the original schedule on file there. *It seeks now to do indirectly that which it cannot do directly.* We cannot believe the Congress intended such a result."

* * * * *

"* * * To hold to the contrary, we believe, would run counter to the Congressional purpose of the Census Act and the assurances given by the Gov-

> ernment to the public. These assurances of confidentiality and protection constitute a pledge of good faith on the part of the Congress, the President and the Department of Commerce. We do not think that another arm of the Government (the Federal Trade Commission) can be heard to say that such representations may be avoided in this indirect manner. The United States has given its word and should be permitted to keep it." (Emphasis, the Court's.)

The Court of Appeals below chose to disagree with *Dilger*, relying on an analogy to cases which hold that copies of income tax return in the taxpayer's files are subject to subpoena.

The attempted analogy to retained copies of income tax reports is fallacious. Section 6103 of the Internal Revenue Code of 1954[61], to which the Court of Appeals referred in its decision, provides that originals of income tax returns "may be inspected upon the order of the President." There is no similar provision in the Census Act. There is a conflict of authority on the question whether this section of the code subjects retained copies in the hands of the taxpayer to the process of administrative agencies;[62] and it does not appear that this Court has ruled upon the question.

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[61] 26 U.S.C. §6103 (Supp. II, 1958).

[62] In *United States* v. *O'Mara*, 122 F. Supp. 399 (D.C. 1954), cited by the Court of Appeals below in support of the non-confidentiality of retained copies of income tax returns, Judge Holtzoff, noting that "this question has not been determined by any appellate court" said (at page 400):

> "The question is a close one, and a debatable one. On the one hand it may be argued that the statute creates a privilege and gives a privileged status to income tax returns similar to that of communications between attorney and client, and other privileged communications, and, if this is the case, the privilege would extend to copies as well as to originals, for surely carbon copies of communications between attorney and client, if the originals are confidential, would not be subject to disclosure."

Maddox v. *Wright*, 103 F. Supp. 400 (D. C. 1952);
O'Connell et al. v. *Olsen & Ungelstadt et al.*, 50-2 USTC 9450 (N.D. Ohio 1949).

Furthermore, there is a clear distinction between income tax returns which are carefully reviewed by accountants and counsel before submission and census reports which are prepared with only sufficient accuracy to meet the needs of the estimates made by the Bureau of the Census. If the information submitted in a census report is to be available to the Federal Trade Commission, many if not most of the items on the report forms could not be answered without a specific reservation as to the accuracy of the answer; and all of the items would have to be cleared by corporate officials, auditors and counsel. The procedure used in preparing the Census reports is described in the "Memorandum For the Secretary of Commerce" submitted in opposition to the petition for a writ of certiorari in *Dilger:*

> "Business records are kept for many purposes, but the need for providing precise, prompt, and accurate replies to inquiries from the Bureau of Census is a need which may be assigned little priority by the company in determining how its records are to be kept. In such cases, the immediate answer to such inquiries is then that the records do not provide the desired information or that final compilations will not be available until some time in the future. An analyst of the Bureau of the Census who is familiar with the particular industry then undertakes to work out, with his opposite number in the reporting company, an estimate based on information in the records as kept. Experience has shown that the technician of the Bureau of the

Census, because of his knowledge of the industry under consideration, may question some estimates as unrealistic and request consideration of other factors before an estimate is agreed upon.

"This technique of developing information is described in some detail to demonstrate how inappropriate it would be to require these figures for the different purposes of the regulatory agency and more importantly to show how helpless the Bureau of the Census would be in its quest for data once it becomes established that these estimates are available to regulatory agencies. Then the answer, that the records of the company do not provide the information requested by the Bureau of the Census, will become the final answer. This concern is not mere speculation but is based on statements by officials of reporting companies made after the decision of the District Court in this cause."

In *Dilger*, Chief Judge Hastings expressly rejected the analogy to the production of copies of income tax returns relied upon by the court below. The Court noted the differences in the statute which expressly provides for the production of tax returns when authorized by the President and pointed out the absence of any similar authority in the Census Act, saying (276 F. 2d 739 at pp. 743-744):

"We do not believe this asserted parallel runs true. Cases holding that copies of income tax returns can be produced involve an entirely different statute and Congressional purpose. Under the provisions of 26 U.S.C.A. §6103 there is Congressional authority whereby such tax returns may be made available. With limited exceptions found in Section 8, there is no such authority given in the Census Act. As Mr. Justice Frankfurter said in *Federal Trade Commission* v. *Bunte Bros.*, 312

> U. S. 349, 353 (1941), 'Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business.'"

In *Dilger*, reference was also made to the opinion of District Judge Weinfeld in *United States* v. *Bethlehem Steel Corporation*, 21 F.R.D. 568 (S.D. N.Y., 1958). That was an action to enjoin the defendants from proceeding with a proposed merger, alleged to be in violation of the Clayton Act. The United States applied for an order to require the production of reports to the Department of Commerce, Bureau of the Census. The companies did not oppose the production of the copies of the reports and urged as a condition that the United States be required to supply the companies with copies of similar reports filed by other major steel producers. The Census Bureau refused to make this information available to the Department of Justice or to any other person. Judge Weinfeld held that the United States could not be required to supply defendants with copies of census reports by other major steel producers, because such reports were confidential under the statute. He gave careful consideration to the statute and its legislative history. In concluding that the information furnished the Census Bureau is privileged, he said (at p. 570):

> "One need not probe far to understand that when Congress imposed upon citizens the duty of disclosing information of a confidential and intimate nature, its purpose was to protect those who complied with the command of the statute. Apart from giving assurance to citizens that the integrity of the information would be preserved by the Government, another purpose was to encourage citizens to submit freely all data desired in recognition of its importance in the enactment of laws and other purposes in the national interests. Accordingly,

> Congress created a privileged status as to the information furnished to the Census Bureau and directed its confidential treatment so as to prevent misuse."

If the Commission's request for petitioner's retained copies of its reports to the Census Bureau is upheld here, then the Commission may be permitted to obtain indirectly what it could not obtain directly. That, we submit, would defeat the legislative purposes as clearly expressed in the statute. The interference with the operation of the Bureau of the Census is shown by the memorandum for the Secretary of Commerce, submitted in opposition to the petition in *Dilger*, in which it was said:

> "Distinctions which may be drawn between the confidentiality which may attach to the original schedule filed by a company reporting and copies thereof retained in accordance with the express request of the Bureau of the Census by a company reporting are unwarranted in so far as the significance of confidentiality is concerned as it affects the operation of the program of censuses. In so far as integrity of data making up the statistics, and necessary cooperation between the company reporting and the Bureau of the Census are concerned, knowledge that either the original or copies, retained or otherwise, of schedules are to be available for scrutiny by regulatory agencies produces the same imposing handicaps to the Department in its administration of the program of censuses. If the retained copy is available, it does not matter to any of the interested parties that the original is not so available. (Of course, the company's own records and data, on the basis of which the reports are prepared, are not immune from subpoena.)
>
> "The importance of the retained copy of such a schedule to the Bureau of the Census should be stressed. This copy serves as a reference point for

discussion between the Bureau of the Census and the company reporting. This is true not only of a current census but also of a subsequent census and of intermediate surveys which may be undertaken. In light of the aim for current data and statistics the importance of a readily available reference is apparent. This copy in the hands of the company reporting is more important to the Bureau of the Census, therefore, than to the company. It is for these reasons that the Census Bureau requests that a copy be retained by the reporting companies; and its promise of confidential treatment of the information contained therein is intended to cover such copy, as well as the original.

* * *

"Finally, copies of schedules should not be made available because the Department of Commerce should not be prevented from keeping its word to companies reporting when the Department has promised that the report cannot be used for purposes of taxation, investigation, or regulation. This promise parallels the promise of the President set forth in the opinion of the Court of Appeals based on Section 9 of the Census Act, which is applicable to both censuses of population and housing and censuses of business and manufactures since both are taken under authority of Title 13 of the United States Code. * * *

"The completeness, accuracy, and timeliness of the statistical reporting system of the Bureau of the Census are founded on cooperation by the reporting companies. This cooperation is obtained by pledging the confidentiality of the relationship between the reporting companies and the Bureau of the Census. No threat of punishment or penalty can substitute for the cooperation now obtained through confidentiality; certain of the reports, obtained on a voluntary basis, are not subject to penal provisions for failure to file a report. To intrude into this relation-

> ship is to destroy it and thereby seriously impair the ability of the Bureau of the Census to furnish the people and their government necessary measures of the social and economic conditions of the United States."

The opinion and decision of Chief Judge Hastings in *FTC* v. *Dilger, supra,* reflects the accurate, careful consideration of the Census Act, its purposes and the interpretation of the statute by the Government over a period of years.

This Court should resolve the conflict between the decision below and in *Dilger* by adopting the conclusion reached by the Court of Appeals for the Seventh Circuit in *Dilger.*

IV

Section 6(b) of the Federal Trade Commission Act as applied by the Commission deprives petitioner of its liberty and property without due process of law.

Three days after the commencement of this action petitioner filed a motion in the District Court to dismiss the complaint on the grounds that Section 6(b) of the FTC Act, as applied by the Commission, is unconstitutional, in that it permits the Commission to issue investigative orders which may not be reviewed unless the recipient of the order is willing to await enforcement proceedings and risk having to pay forfeitures accumulating at the rate of $100 per day during the entire period of judicial review in the event the recipient's objections are not sustained. The motion was denied.[63] At the trial and again in the Court of Appeals petitioner unsuccessfully urged the same constitutional objection.

[63] 24 F.R.D. 366 (S.D. N.Y. 1959).

Throughout, petitioner has relied on a line of cases which hold that judicial review conducted under the coercive influence of liability for mounting penalties is a denial of due process.

Natural Gas Co. v. *Slattery*, 302 U. S. 300 (1937);
Oklahoma Operating Co. v. *Love*, 252 U. S. 331 (1920);
St. Louis, Iron Mountain & Southern Ry. Co. v. *Williams*, 251 U. S. 63 (1919);
Wadley Southern Ry. Co. v. *Georgia*, 235 U. S. 651 (1915);
Missouri Pacific Ry. Co. v. *Tucker*, 230 U. S. 340 (1913);
Ex parte Young, 209 U. S. 123 (1908).

The Court of Appeals below said:[64]

> "Respondents further urge that infliction of the penalty would violate the due process clause of the Fifth Amendment since they would be unable, under *FTC* v. *Claire Furnace Co.*, 274 U. S. 160 (1927), to test the validity of the order save by awaiting and defending the suit in mandamus, with penalties accumulating all the while. If judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply, the procedure might not meet the established standards of due process. Cf. *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331 (1920) • • •"

The Court of Appeals held,[65] however, that one of the premises of petitioner's constitutional argument could not be supported, namely that petitioner had to await enforcement proceedings in order to test the lawfulness of the Commission's orders.

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[64] R. 231.
[65] R. 231-232.

Federal Trade Commission v. *Claire Furnace Co.*, 274 U. S. 160 (1927), a case which has never been overruled by this Court, holds that the recipient of a Federal Trade Commission Section 6(b) order cannot enjoin enforcement thereof, but must await the institution of enforcement proceedings by the Attorney General. The Court of Appeals, held for the first time that the subsequent enactment of the Declaratory Judgment Act and the Administrative Procedure Act had vitiated *Claire Furnace* and that petitioner should have instituted an action for judicial review under these Acts. The Court also said:[66]

> "• • • it is only if such a remedy is available that the forfeiture sanction can withstand attack on due process grounds."

On the basis of this novel ruling petitioner immediately moved in the Court of Appeals, pursuant to the Administrative Procedure Act, Section 10(d), for an order postponing the effective date of the Commission's action pending conclusion of judicial review. The Court of Appeals denied the motion, but granted a stay of its mandate until this Court could consider petitioner's petition for a writ of certiorari.[67]

The motion to postpone the effective date of the Commission's actions was renewed in this Court concurrently with the filing of the writ of certiorari. The motion was granted only to the extent of tolling the forfeitures from the date of the filing of the petition to the completion of review in this Court.[68]

If *Claire Furnace* is a correct statement of the applicable rule and petitioner must await mandamus proceedings in order to test the legality of the Commission's actions,

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[66] R. 232.
[67] R. 235.
[68] R. 238.

then the Federal Trade Commission Act, as applied by the Commission, deprives petitioner of its liberty and property without affording it an opportunity to test the legality of such actions except under conditions which do not meet minimum requirements of due process.[39]

If, on the other hand, *Claire Furnace* has, in effect, been overruled, and the recipient of a Federal Trade Commission investigative order can take action under the Administrative Procedure Act, then it was error for the Court of Appeals to have denied petitioner's motion under Section 10(d) of the Administrative Procedure Act for an order postponing the effective date of the Commission's action; and, when the motion was renewed here, this Court should have granted the relief requested.

If it be argued that petitioner should have moved for a postponement of the effective date of the Commission's action at an earlier date, it should be noted that Section 10(d) of the Administrative Procedure Act does not specify when the motion shall be made. It provides as follows:

> "• • • Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings."

The Commission, it should be noted, encouraged petitioner to refrain from taking action under the Administrative Procedure Act by urging the validity of *Claire Fur-*

[39] See authorities cited, *infra*, page 37.

nace. In a communication replying to an inquiry from petitioner's counsel immediately proceeding the commencement of the Government's action, the Commission's General Counsel stated that it would resist any action which petitioner might commence on the authority of that case.[70]

Petitioner respectfully submits that *Claire Furnace*, barred the commencement by the petitioner of an action under the Administrative Procedure Act or the Declaratory Judgment Act and that, accordingly, it could test the validity of the orders which were addressed to it only by awaiting mandamus proceedings while forfeitures were accumulating, a condition not meeting the requirements of due process.

If, however, this Court should now hold that *Claire Furnace* is or has been overruled and does not reverse the decision below, then petitioner respectfully urges that this Court also reconsider its decision on petitioner's motion which petitioner filed on February 7, 1961, and that upon such reconsideration it grant petitioner all of the relief requested, namely, postponement of the effective date of the Commission's actions until the completion of judicial review by this Court.

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[70] R. 200. Moreover, until it filed its answering brief in the Court of Appeals, the Government had argued that *Claire Furnace* stated the applicable rule and that petitioner had no remedy either under the Administrative Procedure Act or the Declaratory Judgment Act. In the Government's main brief in the Court of Appeals, at page 23, it was said:

> "Since *Claire Furnace*, which has never expressly been overruled or limited, holds that the enforcement proceedings *are* such an adequate remedy at law it would appear that review under the Administrative Procedure Act is inapplicable. And this would appear to hold good for the Declaratory Judgment Act, as well, since that statute requires a 'case of controversy' —and as *Claire Furnace* makes clear, there is no case of controversy before the United States exercises its independent judgment as to whether to bring enforcement proceedings * * * [citing cases]."

CONCLUSION

The judgment of the Court of Appeals should be reversed and the complaint dismissed on the merits, or if not dismissed and the judgment of the District Court is not reinstated, then the effective date of the Commission's orders should be postponed to preserve the status and petitioner's rights pending conclusion of the Court review proceedings.

Respectfully submitted,

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APPENDIX A

TEXTS OF RELEVANT STATUTES

Administrative Procedure Act

Section 6

60 Stat. 240 (1946); 5 U.S.C. §1005(b) and (c) (1958)

"(b) Investigations.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

"(c) Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

Appendix A

SECTION 10

60 Stat. 243 (1946), 5 U.S.C. §1009 (1958)

"SEC. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

"(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

"(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires

by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

"(d) INTERIM RELIEF.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing

court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

Census Act

Section 5

68 Stat. 1013 (1954); 13 U.S.C. §5 (1958)

"Sec. 5. *Schedules; number, form, and scope of inquiries.*

"The Secretary shall prepare schedules, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title."

Section 8

68 Stat. 1013 (1954), 13 U.S.C. §8 (1958)

"(a) The Secretary may, upon a written request, and in his discretion, furnish to Governors of States and Territories, courts of record, and individuals, data for genealogical and other proper purposes, from the population, agriculture, and housing schedules prepared under the authority of subchapter II of chapter 5, upon the payment of the actual, or estimated cost of searching the records and $1 for supplying a certificate.

"(b) The Secretary may furnish transcripts or copies of tables and other census records and make special statistical compilations and surveys for State of local officials, private concerns, or individuals upon the payment of the actual, or estimated cost of such work. In the case of non-profit organizations or agencies the Secretary may en-

gage in joint statistical projects, the cost of which shall be shared equitably as determined by the Secretary and provided that the purposes are otherwise authorized by law.

"(c) In no case shall information furnished under the authority of this section be used to the detriment of the persons to whom such information relates.

"(d) All moneys received in payment for work or services enumerated under this section shall be deposited in a separate account which may be used to pay directly the costs of such work or services, to repay appropriations which initially bore all or part of such costs, or to refund excess sums when necessary."

SECTION 9

68 Stat. 1013 (1954), 13 U.S.C. §9 (1958)

"SEC. 9. Information as Confidential; exception

"(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

"(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

"(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

"(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

"(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records."

FEDERAL TRADE COMMISSION ACT

SECTION 6

38 Stat. 721 (1914), 15 U.S.C. §46 (1958)

"SEC. 6. That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, fur-

nishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

"(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

"(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

"(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

"(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

"(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

SECTION 9

38 Stat. 722 (1914), 15 U.S.C. §49 (1958)

"SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and mem-

bers and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

"The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any

person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided*, That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying."

SECTION 10

38 Stat. 723 (1914), 15 U.S.C. §50 (1958)

"SEC. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon

conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

"Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

"If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance

of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

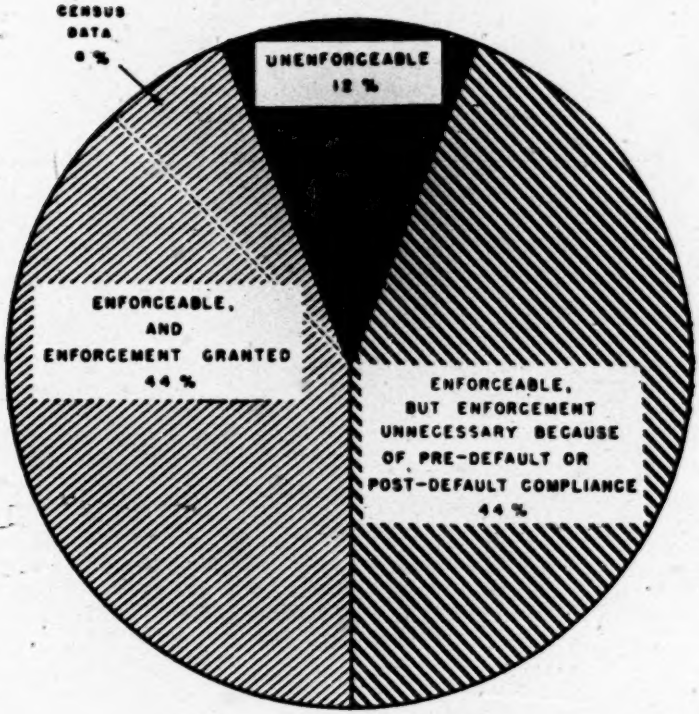
"Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court."

APPENDIX B

Graphs Reproduced from Appendix to Government Brief in the Court of Appeals

FIGURE 1:

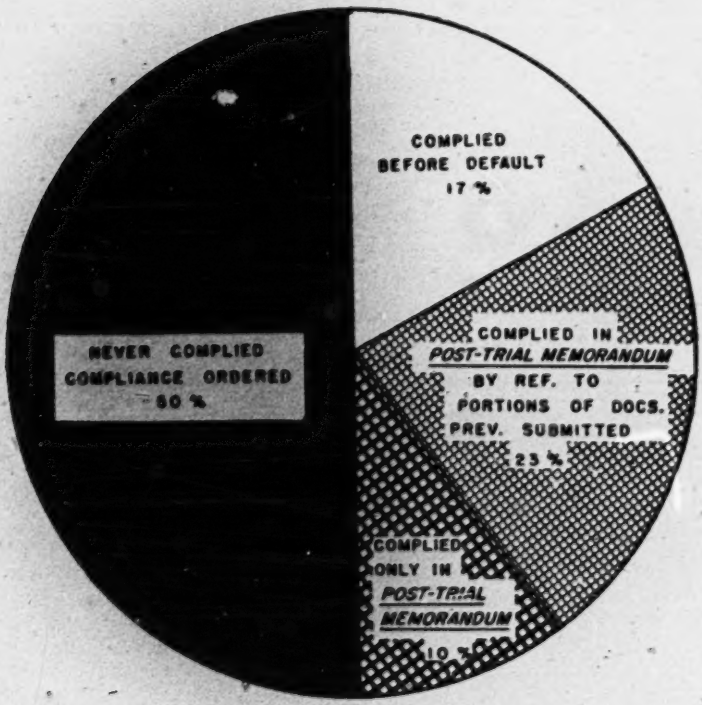
Proportions of enforceable and unenforceable questions in orders 1 through 9



Appendix B

FIGURE 2:

How St. Regis complied with the enforceable questions in orders 1 through 9



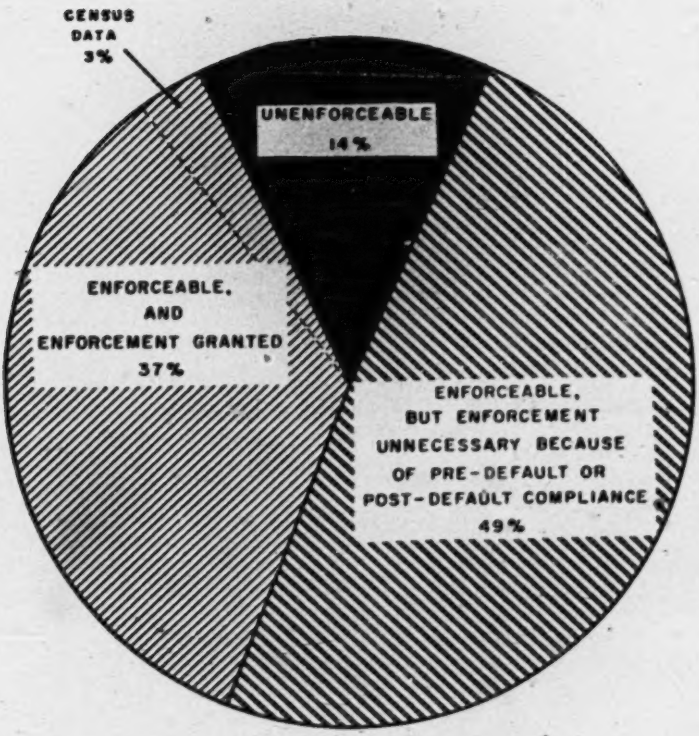
Source: Totals in Table A.

[Note: Category entitled "Complied Only in Post-Trial Memorandum 10%" refers to questions which petitioner's post-trial memorandum pointed out either (a) had no application to petitioner's business or (b) required "information . . . contained at a certain page of some annual report or prospectus" which petitioner had previously furnished (Government brief in the Court of Appeals, filed by the Government with this Court, p. 11, footnote 22).]

Appendix B

FIGURE 3:

Portions of enforceable and unenforceable questions in orders 1 and 7



SOURCE: TOTALS IN TABLE A.

Appendix B

FIGURE 4:

How St. Regis complied with the enforceable questions in orders 1 and 7

SOURCE: TOTALS IN TABLE A.

[NOTE: Category entitled "COMPLIED ONLY IN POST-TRIAL MEMORANDUM 23%" refers to questions which petitioner's post-trial memorandum pointed out either (a) had no application to petitioner's business or (b) required "information . . . contained at a certain page of some annual report or prospectus" which petitioner had previously furnished (Government brief in the Court of Appeals, filed by the Government with this Court, p. 11, footnote 22).]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 218–33) is reported at 285 F. 2d 607. The opinion of the district court (R. 203–12) is reported at 181 F. Supp. 862.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1960 (R. 234). The petition for a writ of certiorari was filed on February 7, 1961, and was granted, limited to certain questions, on March 27, 1961 (365 U.S. 857) (R. 237–38). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The questions presented by petitioner (Br. 2–3) are (except for slight changes in the language in its first question), the questions on which this Court granted certiorari. We believe they should be restated as follows:

1. Whether the Federal Trade Commission may obtain file copies of reports submitted by a corporation to the Bureau of the Census for the census of manufactures, where such copies are retained at the request of the Census Bureau and upon the representation that they are confidential.

2. Whether petitioner was properly held subject to the penalties that Section 10 of the Federal Trade Commission Act imposes upon corporations that fail to file special reports required by the Commission, where, within the period for compliance, petitioner failed to answer two-thirds of the questions called for in such special reports.

Another question—not raised by petitioner—is also presented. It is:

3. Whether petitioner has waived the claim that its retained copies of the census reports are privileged.

STATUTES INVOLVED

The pertinent portions of the statutes involved, the Census Act (13 U.S.C. 9, 132), the Federal Trade Commission Act (15 U.S.C. 46, 49, 50), the Administrative Procedure Act (5 U.S.C. 1005(c), 1009, and the Declaratory Judgment Act (28 U.S.C. 2201), are set forth in Appendix A, *infra*, pp. 71–79.

STATEMENT

This case arises out of a two-count civil action instituted by the United States in the District Court for the Southern District of New York. The first count (R. 1–5, 6) sought a mandatory injunction, as authorized by 15 U.S.C. 49, to compel the petitioner to comply with orders of the Federal Trade Commission directing the submission of special reports. The second count (R. 5–6) sought statutory civil penalties, as provided by 15 U.S.C. 50, for the petitioner's default in submitting such reports. The principal issues before this Court are whether, in the circumstances of the case, petitioner was correctly subjected to penalties, and whether its retained file copies of reports made to the Census Bureau in the census of manufactures are privileged against involuntary disclosure.

The proceedings before the Commission. Petitioner is the second largest manufacturer of paper and paper products in the United States (R. 2, 58; Standard & Poor's *Industry Surveys,* Oct. 21, 1961, P–8—production rank table). In September 1956, the Commission requested petitioner to submit voluntarily certain information and documents relating to nine stock or asset acquisitions it had recently made (R. 88–96). During the next 12 months, the Commission and petitioner had considerable correspondence and oral discussion about this request, but the agency succeeded in securing only eight documents from petitioner (five SEC prospectuses relating to issues of stock offered in exchange for the stock of the acquired corporations and three annual corporate reports) (R. 71–72). Petitioner also per-

mitted the Commission to inspect certain material (R. 72–73).

After failure to obtain voluntary submission of any substantial part of the information requested (compare R. 70–73 with R. 88–109), the Commission served a subpoena *duces tecum* on the corporation in 1957, requiring the production of documents relating to certain of the acquisitions that had been the subject of the 1956 letter, as well as to three additional corporate acquisitions made in the interim (R. 109–113). Petitioner complied with the subpoena, submitting among other data, copies of requested census reports (R. 82–83).

After reviewing the submitted data, the Commission found that it needed additional information to complete its investigation, and on June 30, 1958, it requested petitioner's counsel to supply further information and documents (R. 84, 114). Again there was considerable correspondence (see, *e.g.*, R. 124–162), but during the six months following the Commission's request only two of the many documents requested were submitted (one annual report and one SEC prospectus) (R. 85). Meanwhile, still other acquisitions and mergers took place (R. 86–87).

On January 6, 1959, the Commission formally initiated an investigation of the acquisitions made by petitioner since January 1, 1954 (R. 7–8). Pursuant to this resolution, and by authority of Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. 46(b), the Commission issued six orders on January 9, 1959, requiring the petitioner and five of its acquired companies to file, within 30 days, special reports containing specified information and documents (R. 9–41). On June 4, 1959, the Commission

broadened its investigation to cover petitioner's acquisition of the stock or assets of two additional corporations subsequent to the date of the first resolution (R. 42–43). Pursuant to this second resolution, the Commission, on June 8, 1959, issued further orders, requiring petitioner and the two newly acquired companies to file, within 30 days, special reports containing specified information and documents relating to these acquisitions (R. 44–53). The orders directing the filing of the special reports specified in detail the information to be submitted, broken down into topics and subtopics. In addition, petitioner was directed to submit designated documents, including copies of census reports. The nine orders for special reports called for the submission of 358 separate items of information or documentary material.

The six reports required by the first set of orders had originally been due on February 8, 1959. Because of an extension of time granted in connection with petitioner's motion to vacate the first resolution and the first six orders (R. 163–70), the reports finally became due on May 28, 1959. The three reports required by the second set of orders were due on July 8, 1959. During this entire period, from February through July 1959, petitioner furnished the Commission with the several documents requested in item 1(b) of the first order, and one annual report and two Securities and Exchange Commission prospectuses which contained matter that partially answered various questions in the nine orders for reports (R. 86–87). The latter three documents were submitted unmarked, and there was no way to determine, from the

manner in which they were submitted, what questions, if any, they purported to answer.

The court proceedings. Section 10 of the Federal Trade Commission Act, 15 U.S.C. 50, provides that a corporation that fails to file any special report required by the Commission shall forfeit $100 a day for each day that such failure to file continues after 30 days "after notice of such default." The Commission served the statutory notices of default for the first set of orders on June 20, 1959, and for the second set on July 24, 1959 (R. 53–58, 87). Petitioner took no further steps to comply, and on September 15, 1959, more than three years after the Commission had instituted this antimerger investigation, the United States filed this civil action. The complaint (R. 1–7) sought (1) enforcement of the nine orders and (2) recovery of the statutory civil penalty for default in excess of 30 days.

The nine orders contained 358 separate requests for information. (See tabulation, *infra*, pp. 80–90). Prior to the Commission's issuance of the notices of default, the petitioner had answered 52 (15%) of these requests. It answered an additional 72 of them (20%) in its post-trial memorandum in the district court by referring to certain documents it had submitted both before and after the default date; and it answered another 33 requests (9%) for the first and only time in its post-trial memorandum. Thus, 263 of the requests had not been answered when the action was instituted, 201 when the district court entered its final judgment.[1]

[1] The data in this paragraph, and those in the next paragraph in the text, are derived from the tabulation in Appendix C, *infra*, pp. 80–90. The data are summarized in the graph in Appendix D, *infra*, p. 91.

The district court rejected petitioner's contention that the Commission had no authority to utilize the special reports procedure of Section 6(b) of the Act as a means of obtaining information in an investigation under Section 7 of the Clayton Act (R. 206–207). It held, however, that 43 of the 358 requests for information (12%) were "vague and uncertain" (R. 209), and that petitioner therefore need not respond to them (R. 210–211). The court required answers to the remaining 158 requests "which are enforceable and have not been answered" (R. 210–212), including 21 requests (6%) covering retained copies of census reports (R. 208). Finally, the district court rejected the government's claim for forfeitures. It ruled (R. 212) that since the orders on which the forfeiture claims were based "are partially defective" and since it was enforcing "only * * * those portions of the orders which we find unobjectionable * * * the Government has no right to forfeitures under the circumstances."

Both parties appealed. The court of appeals upheld the district court's order insofar as it directed the petitioner to submit the special reports (including the furnishing of the retained copies of the census reports) (R. 224–229), but it reversed the district court insofar as the latter refused to award forfeitures. The court stated (R. 229–230) that this case involved no "such mitigating circumstances" as "a simple oversight or an honest mistake in a good-faith attempt to comply with the Commission's order." Here the petitioner "refused to accede to many of the Commission's requests for documents and information on the

sole ground that the Commission had no authority to demand what was requested." The court further ruled (R. 231–233) that petitioner could have directly challenged the order requiring the submission of the special reports under either the Declaratory Judgment Act or the Administrative Procedure Act, and that "the exaction of the statutory penalties for noncompliance is fair in any case in which the respondent awaits a mandamus action before contesting the agency's demands, and the order is held valid." [18]

SUMMARY OF ARGUMENT

I

A. Petitioner has waived any claim that the retained copies of its census reports are privileged. Prior to the issuance of the special orders petitioner voluntarily furnished the Commission, at its request and without any claim of privilege, copies of other reports which it had made to the Census Bureau for the census of manufactures. Furthermore, although petitioner objected before the Commission to some of the earlier requests for information, it never claimed that the census reports were

[18] Following the decision below, the court of appeals (one judge dissenting) denied petitioner's motion for an order postponing the effective date of the Commission's order until the completion of further proceedings in this Court (R. 235). Petitioner renewed that motion in this Court. In its order granting certiorari (R. 238), this Court granted the motion "to the extent of tolling * * * the further running and accumulation of forfeitures" from February 7, 1961, the date on which the petition for certiorari was filled. The order further stated (*ibid.*) that petitioner's liability for forfeitures prior to that date "is to abide the event of this litigation."

privileged. The claim was first made in the district court.

Privileges arising out of a confidential relationship, such as lawyer and client, doctor and patient, and husband and wife, are waived by voluntary disclosures which are inconsistent with, or demonstrate indifference to, the existence of a true confidential relationship. The theory upon which retained copies of reports made to the Census Bureau are privileged against disclosure is that there is a confidential relationship between the reporting company and the Census Bureau, created by Congress in order to encourage free and full submission of statistical data. Where the reporting company itself makes retained copies of census reports public, as the petitioner did in the present case by furnishing a number of them to the Commission, it becomes manifest that the company no longer views its relationship with the Census Bureau as confidential with respect to the particular subject to which the reports relate.

The waiver was not limited to the particular reports which petitioner voluntarily supplied. Petitioner also waived any claim of privilege for other reports "relating to the specific subject" (*In re Associated Gas & Electric Co.*, 59 F. Supp. 743, 744 (S.D. N.Y.)) which it chose not to treat as confidential. Here the "specific subject" was the series of corporate acquisitions which the Commission was investigating. All the requests for information, both those in response to which petitioner produced census reports and those in the instant case in which it refused to produce them, were part of a single Commission proceeding.

The enforcement and penalty proceeding in the district court, in which petitioner for the first time raised the claim of privilege, was ancillary to the Commission investigation, and the waiver of the privilege before the Commission also barred its assertion before the district court.

B. The question whether the Commission may obtain retained copies of required census reports involves difficult and conflicting considerations of law and policy with much merit on either side. The Federal Trade Commission and the Antitrust Division of the Department of Justice are of the view that the privilege against disclosure of reports made to the Census Bureau, created by Section 9 of the Census Act, does not extend to copies retained by the reporting companies, and that to so extend it would seriously handicap enforcement of the antitrust laws. The Department of Commerce and the Bureau of the Budget, on the other hand, believe that the statutory privilege does cover copies retained at the request of the Census Bureau, and that to deny confidential treatment to such copies would jeopardize the government's statistical reporting program.

Instead of burdening the Court with briefs from different agencies we attempt here to set forth the competing arguments as effectively and objectively as possible. The Solicitor General is of the view that, if the Court reaches the question, the statutory privilege should extend to the retained copies but not to the underlying data in the company's books and records upon which the reports are based.

II

Section 6(b) of the Federal Trade Act authorizes the Commission to require corporations to file "annual or special * * * reports." Section 10 provides that if any corporation "required * * * to file any annual or special report shall fail so to do * * * [it] shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure." The Commission, as part of a formal investigation instituted under Section 7 of the Clayton Act, ordered petitioner (and seven corporations it had recently acquired) to file nine special reports related to this and other corporate acquisitions. The reports called for 358 items of information or documentary material. As of the time when the suit for penalties was filed, petitioner had answered only 15% of the questions; the district court held that another 12% of them were "so indefinite as to be unenforceable" (R. 211); and 6% related to requests for census reports which may have been privileged. Petitioner was in default as to the remaining two-thirds of the questions. While petitioner answered another 29 percent of the questions in its post-trial memorandum, those answers cannot properly be included in determining the extent of petitioner's default. But even accepting petitioner's own calculations, it still admittedly had defaulted on approximately one-third of the questions. The court of appeals correctly held that petitioner, by such substantial non-compliance, had incurred the statutory penalty for failure to submit special reports.

A. As the court of appeals pointed out (R. 229–230), this is not "a case involving a single oversight

or an honest mistake in a good-faith attempt to comply with the Commission's order * * *." Here, petitioner's primary ground for refusing to comply was its belief that the Commission had no authority to obtain the reports. Since that claim is unfounded the litigant should incur whatever penalty the statute imposes for non-compliance. Petitioner's failure to comply with two-thirds of the items in the orders for special reports constituted a failure to file the reports within the meaning of the statute, and petitioner was properly subjected to the statutory penalties. *Bowman Dairy Co.* v. *United States,* 341 U.S. 214, does not support petitioner's claim that the partial invalidity of the Commission's orders barred the assessment of penalties.

Nor were penalties improperly assessed because the district court, upon concluding that the orders were partially invalid, enforced the valid portions of the orders instead of remanding to the Commission to issue new orders. In so doing, the district court did not convert the Commission's orders into its own orders; it merely lent its authority to compel obedience. Petitioner incurred the penalties when it failed to file the reports ordered by the Commission, and neither the extent nor the method of subsequent judicial enforcement affected its liability therefor.

B. The court of appeals correctly held that, prior to the institution of the government's suit for penalties, petitioner might have brought an action in the district court, under either the Declaratory Judgment Act or Section 10(c) of the Administrative Procedure

Act, to test the Commission's orders. *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, decided before either of those Acts was passed, does not stand in the way of such direct judicial review. In *United States* v. *Morton Salt Co.*, 338 U.S. 632, 654, this Court, in upholding the power of the Commission to require special reports, strongly intimated that such direct review could be obtained in order to avoid accrual of penalties. In any event, since petitioner made no attempt to seek direct judicial review of the Commission's orders, it cannot now be heard to argue that, if it had done so, the court would not have entertained the suit. Petitioner had ample opportunity to institute such an action during the six months between the issuance of the first orders to report and the notices of default on the last.

C. Section 6(b) of the Act authorizes the Commission to require the filing of "annual or special * * * reports or answers in writing to specific questions," and Section 10 imposes penalties for failure to file any "annual or special report." Petitioner argues that since the reports ordered by the Commission called for answers to specific questions, they ceased to be "special reports," within the meaning of Section 6(b); and that a corporation that fails to furnish "answers * * * to specific questions" is not liable for penalties but is subject only to a proceeding to compel it to answer.

But a "special report" does not cease to be such merely because the Commission calls for answers to specific questions. Indeed, any order for a special report must set forth in specific detail the informa-

tion required, for this is necessary in order to enable the recipient to understand what is requested. The simplest—and best—method for insuring such clarity is to ask specific questions. Both the legislative history of Section 6(b) and the general design of the statute indicate that "answers in writing to specific questions" are not a separate category from an "annual or special report"; they are merely illustrative of what such a report may require. A corporation that fails to answer "specific questions" called for in a special report incurs the statutory penalty for failure to report.

ARGUMENT

I

PETITIONER WAS BOUND BY THE ORDER OF THE FEDERAL TRADE COMMISSION TO PRODUCE THE RETAINED COPIES OF ITS CENSUS REPORTS

The major issue mooted in this case, in terms of public importance, is whether petitioner was privileged to refuse to supply the Federal Trade Commission with the file copies which it had retained of reports submitted to the Census Bureau for the census of manufactures. The reports were submitted under compulsion of 13 U.S.C. 221 and 224. The original and file copies [2] bore the legend—

> *Confidential.*—This report is required by Act of Congress, approved August 31, 1954 (13 U.S.C. 131 and 224). Your report is confiden-

[2] The forms for the original and copy of one of the reports involved in this case are reprinted in Appendix B, *infra*, pp. 79a, 79b.

> tial and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation.

Immediately below there appeared on the copy in block letters—

KEEP THIS COPY FOR YOUR FILES

Petitioner asserts that upon these facts a privilege arises under 13 U.S.C. 9 not to furnish investigatory agencies with the retained copies of the census reports. We canvass this very difficult question at pages 25–49 below, but we believe that it need not be decided in the present case because whatever privilege exists was waived by petitioner.

At earlier stages of its investigation into the series of corporate acquisitions made by petitioner since January 1, 1954, the Commission had sought from petitioner copies of other census reports. Petitioner voluntarily furnished a number and made no claim that any were privileged. Furthermore, before the Commission, although petitioner objected on various grounds to the agency's requests for data (including the special reports involved in this case), petitioner never contended that the copies of the census reports were privileged. Petitioner sought to raise the claim for the first time in the district court, as a defense to the suit to compel compliance and for penalties. We submit that the afterthought came too late[3] and that

[3] In our memorandum in response to the petition (p. 2), as well as in our brief in the court of appeals, we indicated the factual basis upon which our present claim of waiver rests.

whatever privilege might have existed had been waived.

A. *By Voluntarily Furnishing the Commission with Some Retained Copies of Census Reports and Making No Claim of Privilege before the Commission, Petitioner Waived any Right to Assert that the Reports Are Confidential.*

1. The facts with respect to petitioner's voluntary submission of the other census reports and its failure to claim any privilege for them, are as follows:

The Commission's original request for information, contained in its letter of September 7, 1956, did not ask for census reports; it merely requested petitioner to furnish specified data (R. 88–96). At a conference between counsel for the Commission and for petitioner, held on September 25, 1956, the latter "was told that schedules or reports submitted by St. Regis and the acquired corporations to the Bureau of the Census for specified years would be accepted in lieu of the data requested" in the letter (R. 70). In February 1957, a Commission representative examined, at the office of petitioner's counsel, the 32 retained copies of petitioner's census of manufactures reports listed at R. 72–73.

Following further unsuccessful attempts to obtain additional information voluntarily (compare R. 88–109 with R. 71–73), the Commission on September 16, 1957, served on petitioner a subpoena *duces tecum*, calling upon it to produce, among other things, "[d]uplicate copies of the complete reports" submitted to the Bureau of the Census for the 1954 census of manufactures by five designated companies (R.

73–74, 109–110, 112). Petitioner moved to quash the subpoena, the Commission denied the motion (R. 74), and petitioner then submitted to the Commission census reports for two of the five companies (R. 74, 82–83). These were not copies retained by the companies, but photocopies of the originals, which the companies apparently obtained from the Bureau of the Census (see R. 82).

The retained copies involved in the instant case were called for by the Commission's orders of January 9, and June 8, 1959, directing the submission of special reports. Although petitioner filed a motion with the Commission to vacate that order, it made no claim that the census reports were privileged (R. 164–167). The grounds upon which it challenged the order was that Section 6 of the Federal Trade Commission Act did not authorize the Commission to obtain special reports in connection with an investigation of alleged violations of Section 7 of the Clayton Act, and that the order itself was unduly broad, was burdensome, and was unnecessary (*ibid.*).

The first time that petitioner challenged the Commission's demand for production of the retained copies on the ground that they were "confidential and privileged" was in its answer to the complaint in the district court (R. 62), filed on October 23, 1959 (R. 58). This was more than two years after the Commission had first resorted to compulsory process to obtain copies of census reports, and more than nine months after it had called for copies of the particular reports involved in this case.

2. Privileges arising out of a particular relationship, the confidential character of which the law deems it important to protect, are waived by voluntary disclosures of what transpires within the relationship which are inconsistent with, or demonstrate indifference to, the existence of a true confidential relationship. This is the rule with respect to privileges covering communications made within such traditionally confidential relationships as attorney and client, husband and wife, and physician and patient. 8 Wigmore, *Evidence* (3d ed.), Secs. 2327, 2340, 2389–2390; McCormick, *Evidence* (1954), pp. 176, 197–199, 217–220. For when parties to a normally confidential relationship show, by their own acts of voluntary disclosure, that they do not view the particular transaction or subject as in fact a confidential one, the basis for confidentiality disappears, and there is no reason for providing confidential treatment for the communications. Thus, "[t]he client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney on the same matter * * *." 8 Wigmore, *Evidence* (3d ed.), Sec. 2327.

An example of the application of this principle is *In re Associated Gas & Electric Co.*, 59 F. Supp. 743 (S.D. N.Y., 1944), which was a proceeding in the bankruptcy court involving a corporate reorganization. The question in that case was whether the privilege as to certain communications between attorney and client, relating to the client's knowledge of a proposed bond issue in 1932, had been waived

because of the voluntary disclosure of other communications between them. The documents were contained in the files of the Trinway Corporation. Two of them (Trustee's Exhibits Nos. 13 and 14) were communications received by the Trinway Corporation's predecessor from its then attorneys; the other four were from the files of such attorneys, consisting of communications between them and the predecessor, and their interoffice memoranda. In 1941 the President of the Trinway Corporation, testifying before a special master in the reorganization proceedings, produced Trustee's Exhibits Nos. 13 and 14, identified them, and permitted them to be marked as exhibits in the proceeding, "without assertion of the claim of privilege or other objection" (p. 744). The district court held that such action constituted a waiver of the attorney-client privilege as to all six documents, and that the Referee in Bankruptcy had therefore correctly rejected the claim of privilege. (The proceeding before the Referee apparently took place two or three years after the production of the two exhibits in 1941.) The court stated (*ibid.*, emphasis added):

> * * * In my opinion when Trinway produced Trustee's Exhibits Nos. 13 and 14 in the litigation before the Special Master and its President took the stand as a witness to identify them and without any objection allowed them or photostatic copies of them to be marked as exhibits in the proceeding, there was what amounted to an intentional waiver of the right to claim that the papers were privileged communications between attorney and client.

> *The privilege is not divisible. The petitioners having waived as to some of the letters relating to the specific subject open the door to all the privileged correspondence between it and its attorney on that specific subject* [*i.e.*, the 1932 bond issuance].

Other illustrative cases in which this principle has been applied are *Hayes* v. *Ricard*, 244 N.C. 313, 93 S.E. 2d 540, in which the examination of an attorney with respect to the purchase of land was held to have waived any privilege with respect to other attorney-client communications about such land; *Epstein* v. *Pennsylvania R.R.*, 250 Mo. 1, 156 S.W. 699, in which a patient's waiver of the physician-patient privilege to permit testimony by one doctor who treated him was held to waive it with respect to testimony by other doctors who had also treated him;[*] *Chamberlain* v. *Chamberlain*, 230 S.W. 2d 184, 188–89 (Mo. App.), where waiver of the privilege with respect to some confidential communications (letters) between husband and wife was held to constitute a waiver of any privilege covering any other relevant communications between them (such as a telephone call) on other matters, since the "waiver goes to the relationship and when exercised as to some confidences which could otherwise be excluded it opens the door for proof of other communications"; and *Driver* v. *Driver*, 52 N.E. 401 (Ind.), holding that a husband who, in attempting to prove his wife's unchastity in a divorce

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[*] Accord: *Chaffee* v. *Kaufman*, 113 Kan. 254, 214 Pac. 618; *In re Quick's Estate*, 161 Wash. 537, 297 Pac. 198; *Steinberg* v. *N.Y. Life Ins. Co.*, 263 N.Y. 45, 188 N.E. 152; *Hudman* v. *State*, 205 P. 2d 1175, 1183 (Okla. Cr. App.)

case, revealed some confidential communications between them reflecting such unchastity, also waived any privilege as to subsequent affectionate communications between them.

3. Similar considerations support the conclusion that petitioner, by voluntarily submitting to the Commission some of its retained copies of reports made to the Census Bureau for the census of manufactures, waived any claim that the remainder of such reports are privileged.

The theory upon which retained copies of reports made to the Census Bureau are privileged against disclosure is that there is a confidential relationship between the reporting company and the Census Bureau, created by Congress in order to encourage free and full submission of statistical data to the government. See *infra*, pp. 36–39, 43–44. That relationship is comparable to the traditional relationships, such as attorney and client, for which the law provides a privilege in order to encourage and facilitate the full and frank communication that is essential to effective functioning of that relationship. For example, a doctor could not treat his patient properly unless the latter felt free to speak to the doctor fully and freely, secure in the knowledge that such information would not be made public without his consent, no matter how incriminating or embarrassing it might be. Similarly, the Census Bureau believes that it could not properly perform its function of obtaining and distributing vital statistical information, unless the reporting companies present their material freely and candidly,

without fear that it might subsequently be made public to their detriment.[5]

Where, however, the reporting company itself makes retained copies of census reports public (as petitioner did in the instant case by voluntarily furnishing a number of them to the Commission), it shows that, with respect to the particular subject to which such reports relate, the company no longer views its relationship with the Census Bureau as confidential.[6] There is no reason to continue to enforce the statutory privilege for census reports when the company itself has ceased to treat them as confidential.

When petitioner voluntarily furnished the Commission with copies of a number of its census reports, it obviously waived its privilege with respect to those

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[5] For a more detailed discussion of the need for confidentiality see pp. 36–39, 43–44 below.

[6] A further indication of this fact is that petitioner, when it moved to vacate the Commission's order calling for a special report, made no claim that the retained copies of the census reports sought were privileged. It seems reasonable to assume that, if petitioner viewed such reports as confidential, it would have raised this point in its motion to vacate—particularly since the Federal Trade Commission Act imposes substantial penalties for failure to file any special report (see *infra*, pp. 49–58).

If petitioner had contended before the Commission that the retained copies were privileged, the Commission might have avoided the problem by rescinding its demand to seek the underlying information instead of the census reports, and then giving petitioner the option to submit the reports in lieu of such data. A demand for information in that form would have raised no question as to disclosure of privileged material. See *infra*, pp. 30–32. Indeed, the Commission had followed that practice in its earlier informal request for information. It there initially sought specific data (R. 91–93) and then advised petitioner that, in place thereof, it might submit census reports (R. 70).

reports. But since the privilege for census reports is based on the need for preserving the confidential character of the relationship between the reporting company and the Census Bureau, such waiver was not limited to the particular reports that were supplied. Petitioner also waived any claim of privilege for other reports "relating to the specific subject" (*Associated Gas & Electric Co., supra*) which it was no longer treating as confidential. For what it was waiving was not a privilege for particular documents, but for the relationship which the privilege is designed to protect.

The "specific subject" with respect to which petitioner waived its privilege was the series of corporate acquisitions which were under investigation by the Commission. The Commission's original informal request for information, in response to which petitioner permitted the Commission to examine 32 schedules of its census reports (R. 72–73), stated that the Commission was investigating the acquisition by petitioner of nine specified companies, "to determine whether the said acquisitions, or any of them, may be in contravention of Section 7 of the Clayton Act" (R. 88–89). Similarly, the Commission's subpoena *duces tecum*, in response to which petitioner again submitted copies of some census reports (R. 74, 82–83), called for production of "All paper writings, written or received since January 1, 1955, which refer or relate to the desirability, necessity or other reasons bearing on the decision of St. Regis Paper Company to acquire the securities or assets" of six specified companies, the first four of which had also been listed in the earlier informal request for information (R.

110, 88–89). Finally, the Commission's order requiring petitioner to file the special report (R. 9) stated that such submission was being directed pursuant to a Commission resolution, a copy of which was enclosed, which instituted an investigation of the "Acquisition by St. Regis Paper Company of the Stock or Assets or Both the Stock and Assets, of Other Corporations" (R. 7, 9). All of these requests and demands for information were made in connection with a single Commission proceeding, namely, the investigation of the legality under Section 7 of the Clayton Act of petitioner's corporate acquisitions. Moreover, as to itself and three of the acquired companies (Pacific Waxed Paper Co., Pollock Paper Corp., and Rhinelander Paper Co.) whose retained copies were sought in the special report, petitioner had previously voluntarily submitted copies of other census reports (R. 11, 72, 115; 32, 82; 35, 82–83; 40, 82).

Thus, when petitioner voluntarily submitted to the Commission copies of some census reports, it waived its privilege to bar disclosure of any other census reports that related to the Commission's investigation of its corporate acquisitions. The copies of the reports involved in the instant case were sought in connection with that investigation, and they therefore related to the "specific subject" (*Associated Gas & Electric, supra*) as to which petitioner had waived its privilege. In these circumstances, petitioner could not validly make any claim of privilege for such reports. "The privilege is not divisible," and petitioner "having waived as to some of the" reports, "open[ed] the door to all * * *" (*ibid.*).

The enforcement and penalty proceeding in the district court, in which petitioner for the first time raised the claim of privilege, was ancillary to, and in implementation of, the administrative proceeding. Accordingly, petitioner's waiver of its privilege before the Commission also operated to bar it from asserting the privilege in the district court action brought by the United States, at the Commission's request, in aid of the Commission proceeding. As Mr. Justice Holmes stated, when he was Chief Justice of the Massachusetts Supreme Judicial Court, in holding that the waiver of the attorney-client privilege at an earlier hearing in the probate court operated to bar its assertion in a subsequent proceeding involving the trustees' accounting, "The privacy for the sake of which the privilege was created was gone by the appellant's own consent, and the privilege does not remain in such circumstances for the mere sake of giving the client an additional weapon to use or not at his choice." *Green* v. *Crapo,* 181 Mass. 55, 62, 62 N.E. 956, 959.

B. ***Considerations Bearing on the Right of the Federal Trade Commission to Obtain Retained Copies of Census Reports.***

The question whether a privilege of confidentiality attaches to copies of census reports arises not merely because of the private interest of petitioner in resisting an investigation which might lead to adversary proceedings for violation of the antitrust laws. Its more significant source is the collision of two public interests. There is a strong public interest in having all pertinent and reliable data readily available as

evidence in judicial and administrative proceedings, regardless of how the evidence cuts, which interest includes, but is not confined to, the government's interest in being able to obtain the retained copies of census reports because they often facilitate the effective enforcement of the antitrust laws. See pp. 39–42 below. On the other hand, there is an opposing public interest in the gathering of accurate and detailed statistical studies concerning our national needs and resources. The Census Bureau experts believe, for reasons which we detail at pp. 36–39 below, that this interest is advanced by having copies of business reports to the Bureau retained in the files of the reporting firms, and that the willingness of business concerns to retain their copies depends upon the privilege of secrecy.

The language of Section 9 of the Census Act is not so clear as to prevent these conflicting interests from giving rise to reasonable differences of opinion concerning its application to a private person's retained copies of census reports, at least when the copies are kept at the request of the Census Bureau. The several interested departments and agencies of the federal government have adopted inconsistent positions. The Federal Trade Commission, which originally requested the retained copies of petitioner's census reports, believes that in the absence of any indication by the Congress to the contrary either in the statute or its legislative history, the privileged status of census reports in the possession of the Census Bureau does not extend to copies retained by the reporting concern, even though these copies bear a

legend placed therein by the Bureau without explicit statutory authorization. The Commission also believes that any extension of the statutory privilege would seriously hamper it in obtaining evidence necessary for the effective performance of its law enforcement duties under the Federal Trade Commission and Clayton Acts. The Antitrust Division of the Department of Justice, which brought this action in the name of the United States at the request of the Federal Trade Commission to compel compliance and collect penalties for failure to comply with the request, shares the Commission's view. The Census Bureau, the Department of Commerce, and also the Bureau of the Budget, which is charged with an interdepartmental responsibility for various questionnaires, have all adopted the view that the retained copies are not subject to legal process and have so informed reporting companies.

The Solicitor General, while fully recognizing the delicate balance of opposing considerations, is satisfied that upon this issue the ruling below is wrong—that the privileged status given to census reports in the possession of the Census Bureau extends to copies of compulsory reports retained by the reporting concern at the Bureau's request and for its purposes. In the present situation, however, the issue cannot appropriately be rendered moot merely by conceding the point. The United States insists that petitioner waived any privilege and therefore is unwilling merely to dismiss that part of the action which seeks to compel the production of the copies (see pp. 16–25, above). Furthermore, if the point is reached,

the public interest would be best served by a decision by this Court. The existence of reasonably differing opinions, not only among government agencies but between the Courts of Appeals for the Second and Seventh Circuits,[1] shows that the question cannot otherwise be put to rest. The case was brought at the request of the Federal Trade Commission, which has an independent responsibility for performing its statutory functions, and the Commission is not persuaded by the reasoning of the Solicitor General. Furthermore, as an independent administrative agency, the Federal Trade Commission, unlike the Antitrust Division, is not subject to the Solicitor General or the Department of Justice in litigation in the inferior federal courts. In combination, these circumstances furnish persuasive reasons for submitting the issue for decision by this Court after canvassing all sides of the question.

NATURE OF THE ISSUE

The precise question presented for decision in this case is whether copies of compulsory census reports retained in the petitioner's files at the request of the Census Bureau are subject to subpoena. A very similar, perhaps identical, issue might arise with respect to the voluntary interim reports which business firms frequently make to the Census Bureau at its

[1] In *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 certiorari denied, 364 U.S. 882, the Seventh Circuit held that the Commission could not obtain retained copies of census reports. In holding to the contrary in the present case, the Second Circuit explicitly stated (R. 228–229) that it "disagree[d]" with *Dilger*.

request but which they are under no legal compulsion to file. The Department of Commerce and the Bureau of the Budget feel that no distinction can properly be drawn and that their success in getting voluntary reports depends upon the originals and copies being accorded the same confidential status as compulsory reports. Although it may well be true that both compulsory reports and their copies and voluntary reports and their copies have the same legal status in respect of disclosure or privilege, the latter are not involved in this case and it is possible that at some points distinctions might be drawn. Accordingly, this brief deals only with the precise issue before the Court—the status of copies of compulsory reports—and it phrases the relevant propositions of law in those terms. However, we do not intend to imply that the government would take any different position with respect to voluntary reports or their copies.

The question lies midway between two propositions with respect to which the law seems clear but which ought to be plainly articulated by this Court in order to avoid future litigation.

First, all reports made to the Census Bureau under compulsion of law are privileged, while in its possession, against subpoena or other legal process. Although Section 9 of the Census Act in terms prohibits merely the voluntary disclosure of data from individual reports in the possession of the Bureau by employees of the Department of Commerce, the reports are not subject to legal process.

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Second, the fact that a business concern has made a report to the Census Bureau does not diminish its obligation to furnish information, reports or documents to other government agencies such as the Federal Trade Commission in response to subpoenas, interrogatories, discovery, or other legal process. The situation is to be viewed pretty much as if the census report did not exist, and indeed had never been made. The other government agencies cannot obtain the report from the Census Bureau. The status of retained copies is in issue here, and the right of investigators to ask, "What information did you give the Census Bureau," would seem to be governed by whatever rule is applicable to retained copies. Reserving this point, parties to litigation and the investigatory and regulatory agencies have exactly the same rights to interrogate business firms and to subpoena papers as they would if there were no census reports. The fact that a company has given certain information to the Census Bureau does not excuse the firm from giving accurate information upon the same subjects (which may be the same information) to the Federal Trade Commission or other branches of the government. This is made clear by 13 U.S.C. 132, which provides that nothing in the Census Act "shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information." All the government departments and agencies mentioned above, including the Census Bureau, concur in this view.

To illustrate the point specifically, the census of manufactures form requests companies such as petitioner to furnish estimates of the value of their products, broken down into specified categories with further breakdowns showing interplant transfers within the company. Under Section 6 of the Federal Trade Commission Act the Federal Trade Commission has the power to ask a company in interstate commerce for precisely the same information. Indeed, although the Commission could not properly require the company to disclose what responses it made on the census form, surely the Commission could properly explain that its questions referred to exactly the same categories and carried the same meaning as the questions put by the Census Bureau. (The clarification would be important because the Commission often wishes to compare the figures for individual companies with the published Census figures for all manufacturers.) The company would satisfy any legal duty by giving an honest response to the Commission, even though it differed from the answer furnished the Census Bureau; but it would be required to answer.

It follows that we reject, and ask the Court specifically to repudiate, any contrary implication in the *Dilger* case where the Seventh Circuit said (276 F. 2d 739, 743, emphasis in original)—

> *It* [the Federal Trade Commission] *now seeks to do indirectly that which it cannot do directly.* We cannot believe the Congress intended such a result.

This statement is unobjectionable if it means only that the Federal Trade Commission may not indirectly obtain the contents of the actual census reports by subpoenaing copies retained at the request of the Census Bureau or by inquiring, "What did you report to the Census Bureau." Unfortunately, the *Dilger* opinion has been widely interpreted as meaning that other government agencies cannot obtain from other data in a company's files the same information that the company furnished the Census Bureau, thus extending the cloak of the census privilege to all information in a company's possession bearing upon subjects upon which it has given information to the Census Bureau. To sustain petitioner's position and the result of the *Dilger* case without repudiating this interpretation would be productive of unnecessary litigation and delay in the enforcement of the antitrust laws.

The present issue lies between these two areas in which the law seems clear. The retained copies, by hypothesis, are not in the possession of the Census Bureau. Petitioner was under no legal obligation to retain them. On the other hand, the copies were created by the census; presumably they would not otherwise exist. And although many companies would undoubtedly keep copies for their own use, the Census Bureau requests their retention because it believes that otherwise many other companies would not keep them on file where their availability greatly facilitates the checking and clarification of the original census reports in the possession of the Census Bureau.

STATUTORY LANGUAGE

Section 9(a) of the Census Act provides—

> § 9. *Information as confidential; exception*
>
> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 [*] of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

Literally construed, the statute sustains the view of the Federal Trade Commission and shows petitioner's interpretation to be wrong. As Chief Judge Lumbard said in the court below, "the plain terms of that statute apply only to the Department of Commerce and do not bar any other federal agency from divulging such information if it comes from different sources or from demanding that a copy remaining in the respondent's files be produced" (R. 228).

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[*] Section 8 authorizes the Secretary of Commerce to furnish certain information from censuses of population, agriculture and housing, under specified conditions. Section 8 does not apply to the census of manufactures. Section 9(a) refers to all censuses under the Act, except for the censuses of governments, excluded by Section 9(b).

The spontaneous reading is confirmed by comparing the Census Act with other legislation. The Internal Revenue Code makes income tax returns confidential within the Internal Revenue Service, subject to release by the President, 26 U.S.C. 6103, 7213(a), yet any copies which a taxpayer keeps in his files are subject to discovery and subpoena in all kinds of litigation.* The Criminal Code prohibits federal employees from disclosing trade secrets and other business data of which they acquire knowledge in the course of their official duties, 18 U.S.C. 1905, but the same information can be obtained from a reporting firm by ordinary judicial process. When Congress wished to prevent reports or records prepared for the government from being used in litigation, it has adopted unequivocal words. For example, 45 U.S.C. 41 provides that the reports of accidents made by interstate railroads shall not "be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investi-

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* *E.g.*, *Star* v. *Rogalny*, 22 F.R.D. 256, 258 (E.D. Ill.); *Rush* v. *Chicago B. & Q.R. Co.*, 22 F.R.D. 188, 189 (D. Neb.); *Kingsley* v. *Delaware L. & W.R. Co.*, 20 F.R.D. 156, 158–9 (S.D. N.Y.); *Karlsson* v. *Wolfson*, 18 F.R.D. 474, 476 (D. Minn.); *Tollefsen* v. *Phillips*, 16 F.R.D. 348, 349 (D. Mass.); *Reeves* v. *Pennsylvania R. Co.*, 80 F. Supp. 107, 108 (D. Del.); *The Sultana*, 77 F. Supp. 287, 288 (W.D. N.Y.); *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F.R.D. 190 (D. Conn.); *Currier* v. *Allied New Hampshire Gas Co.*, 101 N.H. 205, 137 A. 2d 405. In a number of cases, taxpayers who had not retained copies of their tax returns were directed by the courts to obtain such copies from the government and produce it for use in the proceeding. *E.g.*, *Kingsley* v. *Delaware L. & W.R. Co.*, *supra*; *Tollefsen* v. *Phillips*, *supra*; *Reeves* v. *Pennsylvania R. Co.*, *supra*.

gation." See also 49 U.S.C. 320(f). There is no such language in the Census Act.

If the question were to be decided upon the bare words of the statute, one would surely conclude that the decision below was correct. This conclusion is fortified, moreover, by a presumption that statutory constructions having the effect of suppressing otherwise competent evidence are to be avoided where not required by the statutory words. Cf. *Connecticut Importing Co.* v. *Continental Distilling Corp.*, 1 F.R.D. 190, 191–2 (D. Conn.).[10] The words are not so plain, however, as to preclude consideration of the policy of the statute and appraisal of underlying considerations in the light of what is known about the Congressional intent. There is rather general agreement that, despite the narrow limitation upon disclosure which the language imports, the privilege is not confined to voluntary disclosure but extends to subpoenas or other legal process directed to census employees. The literal reading places heavy stress upon the word "furnished" and makes confidential only papers physically in the possession of the Census Bureau. In this view the privilege does not apply to the original form after it has been filled out but before it is mailed. It would not apply to the original form if it were returned to the company to be corrected and sent back to the Census Bureau. These last propositions are

[10] The reason for the rule was stated in *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 695, 83 P. 2d 305, 310: "Since the protection against privileged communications often leads to a suppression of the truth and to a defeat of justice, the tendency of the courts is toward a strict construction of such statutes."

manifestly at war with the underlying purpose of Section 9 and therefore suggest that the literal reading proves too much. For if the original report either before it is mailed or while it is back in the hands of the company for correction comes under Section 9, a copy prepared and retained at the request and for the use of the Census Bureau whenever the Bureau should call, can also be brought within the idea of "furnished" without doing violence to the word. Surely the words are not so plain, if the policy of the Act points to a broader view, as to require the Court to deny the privilege, saying "We see what you are driving at, but you have not said it, and therefore we shall go on before." *Johnson* v. *United States*, 163 Fed. 30, 32.

Before analyzing the statute further, however, with a view to discerning its policy, it will be helpful to state somewhat more fully the opposing interests that demand recognition.

THE INTEREST IN SECRECY

Accurate and current statistics measuring social and economic conditions in the United States are extremely important not only to many private businesses but in the formulation of legislative and executive policies. Public support for the program and the willingness of individual firms to cooperate in promptly furnishing data, including candid estimates, uninhibited by the fear of adverse use, depends upon assurances that their secrecy will be preserved. The high priority which Congress gives both the program and the need for secrecy is evident from census legislation.

The retained copies have an important place in the census of manufactures. Business records are kept for many purposes, but the need for providing precise, prompt, and accurate replies to inquiries from the Bureau of the Census may be assigned little priority by a company in determining how its records are to be kept. In such cases, the immediate answer to such inquiries is that the records do not provide the desired information or that final compilations will not be available until some time in the future. An analyst of the Bureau who is familiar with the particular industry then undertakes to work out, with his opposite number in the reporting company, an estimate based on information in the records as kept. Experience has shown that the technician of the Bureau of the Census, because of his knowledge of the industry under consideration, may question some estimates as unrealistic and request consideration of other factors before an estimate is agreed upon. In like manner he may doubt, and therefore wish to verify, particular returns. The process of compiling the necessary statistics for even a single company often involves close and continuous collaboration between company technicians and Census Bureau experts. The importance of consultation is enhanced when new company employees are assigned to its census reports or a question arises about the strict comparability of the reports of several firms.

The retained copies are the focal point of these discussions between the Bureau of the Census and reporting firms. This is true not only of a current census but also of a subsequent census and of in-

termediate surveys which may be undertaken. In light of the aim for current data and statistics the importance of a readily available reference is apparent. Keeping a copy in the hands of the company reporting is more important to the Bureau of the Census, probably, than to the company. It is for these reasons that the Census Bureau requests that the copy be retained by the reporting companies, and intends that its promise of confidential treatment cover the copy as well as the original.

It is difficult to form a precise, impartial judgment concerning the effect upon the Census Bureau of holding that retained copies of census reports are subject to legal process to the same extent as any other papers in a company's files. The original reports would remain confidential. Although we agree that "[n]o threat of punishment or penalty can substitute for the cooperation now obtained through confidentiality,"[11] it seems probable that any reporting firms which feared the consequences of disclosure would stop keeping copies rather than refuse to cooperate. The copies are highly important to the census. There is no other vehicle for immediate consultation, and the substitutes also entail trouble and expense. Thus, the critical question is whether the want of the privilege would lead a significant number of business firms to refuse to keep copies of their census reports.

There are those who sincerely believe that the copies would still be kept. The habit of keeping copies of

[11] Memorandum for the Secretary of Commerce in *Federal Trade Commission* v. *Dilger*, No. 375, October Term, 1960, p. 6.

everything in business files is exceedingly strong. The reports are often useful to the companies themselves, and they often turn them over to the Federal Trade Commission voluntarily instead of preparing new data in answer to its requests (as did the petitioner at an earlier stage in this case—*supra*, pp. 16–17). Comparatively few firms are worried about some possible future investigation under the antitrust laws or fear disclosure under proper safeguards in judicial proceedings. Despite these influences the Department of Commerce, the Census Bureau and the Bureau of the Budget are firmly convinced by their knowledge of the business community and experience in other countries that an effective pledge of confidentiality is absolutely essential to the preservation of the present practice of using, for the purposes of consultation, file copies of census reports. Their judgment is to some degree confirmed by the fact that the dominant concerns in any industrial classification, whose data are therefore most important in the census, are also the firms most likely to take account of the regulatory consequences of disclosure.

THE INTEREST IN DISCLOSURE

There is obviously a broad public interest in having all pertinent and reliable evidence available in administrative and judicial proceedings. Census data is often crucially important in antitrust litigation. Data defining the market and revealing its structure and other characteristics may be necessary in most antitrust cases, and may be decisive under the standards announced by this Court in such cases as *Standard Oil Co.* v. *United States*, 337 U.S. 293; *United*

States v. *duPont*, 353 U.S. 586; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320. Evidence showing the shares of different firms in the relevant market is essential to resolution of Clayton Act, Section 7, cases and Federal Trade Commission Act anti-merger cases. Frequently the only data in existence which afford a reliably informative comparison between one company's activities, on the one hand, and the total activities of all such companies, on the other, are the Census Bureau's compilations (so-called "universe" figures), made in a census of manufactures, and the individual company's report submitted in the same census. For many industries no other pairs of figures exist which are predicated upon the same definitions, areas, products, periods of time, etc.—all essential if comparison of the figures is to be meaningful. Since such alternative compilations as are available in company files are rarely prepared upon the same basis as, and hence are not comparable with, the "universe" figures, reconstruction of comparable compilations from basic records may be either impossible or prohibitively time-consuming and expensive, or both.

In addition to 29 anti-merger cases in present litigation, the Commission now examines about 1,000 mergers a year and formally investigates over 100 mergers a year; as of June 30, 1961, 102 such investigations were in progress. For many years the Commission, like the Antitrust Division of the Department of Justice, has obtained and used retained copies of reports to the Census Bureau in making preliminary evaluations of mergers and in merger

litigation. A number of companies have voluntarily obtained from the Bureau copies of reports which they had not retained, for submission to the Commission in lieu of less convenient production.

The interest served by making retained copies of census reports available in antitrust proceedings is not confined to the government. Companies under investigation may be equally concerned to investigate the reliability of universe figures or to verify comparisons. In the litigation involving the proposed merger between the Bethlehem and Youngstown steel companies it was Bethlehem which unsuccessfully sought copies of other companies' census reports. *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D. N.Y.).

Yet it is undoubtedly the agencies charged with enforcement that feel the greatest concern. They are the moving parties. Effective enforcement requires prompt action. Much but not all the information obtainable through retained copies of census reports could ultimately be elicited by interrogatories, discovery and like processes of inquiry into the underlying records in ordinary business files. Unfortunately these are slow and tedious proceedings. Census information fulfills two functions. Its prime use is to give the government a quick initial appraisal of the relative positions of companies in the pertinent market and thus enable the government to gauge, in a general way, the likely impact of corporate acquisitions and mergers and to select appropriate fields for further antitrust investigation and proceedings. Census information is also used, along with other

evidence, in proof of formal charges of violation of the antitrust laws. The ready availability of such information at an early stage is important, if not crucial, to effective antitrust enforcement. Permitting firms to withhold such documents, and instead to prepare answers to the identical questions, would place a premium upon the dilatory evasive tactics followed by petitioner.

THE POLICY OF THE CENSUS ACT

It has been suggested that the purpose of Section 9 of the Census Act, like the purpose of the corresponding provisions of the Internal Revenue Act, is to impose a duty of non-disclosure upon federal employees in order "to prevent wholesale revelation of confidential information to persons not determined to have a legitimate interest therein." *Tollefsen* v. *Phillips,* 16 F.R.D. 348, 349 (D. Mass.); *Currier* v. *Allied New Hampshire Gas Co.,* 101 N.H. 205, 206–207, 137 A. 2d 405, 407. The evil is said to be "wholesale" disclosure by the government—the indiscriminate use of information submitted for limited purposes, without the knowledge of the person concerned and adversely to his interests. If such revelations were not halted, it would be unfair and self-defeating for the census system to be employed as an instrument for the gathering of facts which persons subject to the census would otherwise keep secret. When the data become pertinent in an authorized administrative, judicial or legislative inquiry, it is said, a new factor is introduced, for there is then a clear public interest in having such

proceedings decided on the basis of the best possible evidence. The disclosure would usually come from a party's own records with full opportunity for explanation. It would be limited to specific papers relevant to a legitimate inquiry, and there would be judicial safeguards against irrelevant questions and indiscriminate publication. At the point where these factors become relevant, it is concluded, the policy of Section 9 breaks off.

This is obviously an intelligent (although debatable) view of what the public policy in this area should be; and it might well express the judgment of Congress articulated in Section 9. It would seem, however, that the policy of Section 9 is actually broader. Subdivision (1) indicates that the aim is to confine the use of census data to general statistical purposes. This limitation would be violated by admitting the data as evidence in litigation or a regulatory proceeding. The language specifically forbidding any officer or employee from using the information furnished under the Census Act "for any purpose other than the statistical purposes for which it is supplied" was introduced by Section 25 of the Act of July 2, 1909, 36 Stat. 9. Previous census legislation had simply prohibited communication to unauthorized persons. When the new words were added, they were said to give "a more effective guaranty than heretofore of the confidential character of the returns as needed in many cases and desirable in all to enlist that public confidence without which census inquiries must fail." H. Rep. No. 960, 60th Cong., 1st Sess., p. 23. Subdivision 3, which came into the

statute at the same time, forbids the Bureau to permit anyone other than the sworn officers and employees of the Bureau to examine individual reports. One who was concerned only with loose broadcasting or leaks to competitors or other unauthorized private individuals would not have written these broad prohibitions.

Thus, the true underlying policy of Section 9 appears to embrace these additional objectives: (a) to remove any opposition to the census based upon the notion that it is unfair for the government to require information for allegedly statistical purposes and then to use it adversely to the one who has made the report, and (b) to encourage business firms and others subject to the census voluntarily to cooperate in the development of accurate statistics and to give completely candid answers, including uninhibited estimates upon matters not subject to absolute proof, without the circumspection and delay stimulated by awareness that returns may be subject to judicial or regulatory scrutiny.

This view was expressed in a proclamation dealing with the census of population, not with the census of manufactures, issued by the President of the United States on November 22, 1929, 46 Stat. 3011—

> The sole purpose of the Census is to secure general statistical information regarding the population and resources of the country * * *. No person can be harmed in any way by furnishing the information required. The Census has nothing to do with taxation * * * or with the enforcement of any national, state, or local law or ordinance. * * *

It may be argued that to extend a privilege of secrecy to data maintained or reports submitted without the compulsion of law would create an unreasonable risk that the Department of Commerce or Census Bureau might so broaden the privilege as to impair the normal conduct of judicial proceedings and hamper the work of regulatory agencies. That question, however, is not presented here, for the reports in question were compulsory. Whatever danger there may be in the case of voluntary reports (as to which we express no opinion), it cannot arise in the case of copies of required reports. If, when the question arises, the danger seems real, the privilege applicable to copies could, if necessary, be confined to the kinds of reports prescribed by law. The privilege would then be coextensive in subject matter with the scope of the legal compulsion to report and thus effectively confined to the kinds of information which Congress made confidential. There is no danger of unwarranted extension to different subjects in holding that required reports and copies of required reports kept for the Census Bureau are privileged even though they are in the possession of the reporting firm. We would think it plain, therefore, that the policy of Section 9 (as we interpret it) extended to any copies of compulsory census reports retained in a company's files solely for the convenience of the Census Bureau.

The difficulty in the question presented in this case arises from the fact that many concerns would keep their copies for their own convenience even though the Census Bureau did not request their retention.

Where the report was kept solely for the company's own use without serving any statistical purpose of the government, there would be no reason to accord it a privileged status. As pointed out at page 34 above, this is the rule with respect to a taxpayer's copies of income tax returns. In this situation any other rule would seem unduly to curtail the rights of investigatory agencies like the Federal Trade Commission.

Thus the decision upon whether the policy of Section 9 extends to retained copies of required census reports seems to depend upon one's appraisal of the reasons for their retention, not subjectively in the individual case, but, since a uniform rule must be laid down, generally for all reporting firms. The true explanation probably varies from company to company over a broad spectrum ranging from companies which keep the copies solely to accommodate the Census Bureau, through those who have mixed motives, to those who would undoubtedly keep copies for their private use. One can only guess at the distribution in the range.

In these circumstances the Solicitor General believes that the legend upon the census report and file copy should be conclusive. The United States has requested the retention of the file copy for its purposes. The United States has given assurances of confidentiality which were in-recipients, to apply to the copy as well as the original. See pages 47–48 below. It would have been more complicated in form, but scarcely different in substance, for the Census Bureau to have worked out a system of duplicate originals, one of which was

mailed to the Bureau and the other of which was retained as an official government document by the company acting as the government's agent. Compare *Shapiro* v. *United States,* 335 U.S. 1. Having requested retention for its purposes, the United States should not later assert that the copy would have been kept without the government's request. And in such matters the United States should be treated as one government, with all its agencies bound by the same rule.

The Federal Trade Commission argued in the *Dilger* case,[12] and would press upon the Court here, the conclusion that the legend on the census form does not assert that the retained copies are privileged against disclosure when material to legal or administrative proceedings. The statement that the report is "confidential," accessible only to "sworn Census employees" and not for "purposes of taxation, investigation or regulation" is only a paraphrasing of the statute. The reference to access by census employees, the Commission believes, gives any company fair warning that the statement applies only to Census Bureau files, not to the firm's private records, which are not examined by census employees and access to which is not controlled by the Census Bureau. The fact that the legend appears on the duplicate as well as the original can fairly be attributed to the desire to make it an exact duplicate and therefore does not necessarily suggest any independent assertion that the duplicate is privileged. The weakness in this argument is that the Census Bureau and Department of

[12] The Antitrust Division also presented this argument in the courts below. See R. 228.

Commerce, which are the authors of the forms and legend, interpret them as pledging secrecy for the copies; and these branches of the government inform us that they have consistently assured companies that this is their meaning. The response of the Federal Trade Commission and Antitrust Division is that, even if theirs is not a correct interpretation of the form, the Census Bureau has no power to extend the statutory privilege and the United States is not estopped by the unauthorized and mistaken misrepresentations of the officials of a single agency. Cf. *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380, 384; *United States* v. *California,* 332 U.S. 19, 39–40.

Although the harsh rule barring estoppel of the government by the unauthorized acts of its officials may often be necessary to protect the public interest, it is doubtful whether it should extend to obtaining copies of documents which might not even exist but for reliance upon the official representation. In private law a principal is not bound by a transaction negotiated through the unauthorized representations of an agent acting outside the scope of his actual and apparent authority but, if the principal wishes to take the benefits of the transaction, he cannot also disavow the representations. Restatement of Agency 2d, A.L.I., Sec. 98. And by a parity of reasoning it might be said that if the government wishes to take advantage of documents created at the request of one of its departments, the government cannot disavow the accompanying representation.

But the point need not be decided. Here the nub of the matter is that the copies were retained at the request of the Census Bureau for its statistical purposes. The request was authorized; and it is the request, not the assurances of confidentiality, that brings the copies within the policy of the Act. See pp. 42–47 above. If there were doubt, the assurances would be entitled to weight as the interpretation put upon the Census Act by the department principally charged with its administration. *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315.

It is the opinion of the Solicitor General, therefore, that although there are strong arguments for either interpretation, the balance favors the construction which accords the statutory privilege to copies of compulsory census reports which are kept at the request of the Census Bureau for its statistical purposes. It should be emphasized, however, that the privilege does not reach other data in a company's files nor justify a refusal to furnish information upon the subjects covered by the reports, provided that disclosure of the reports *per se* is not required.

II

THE STATUTORY PENALTY WAS PROPERLY ASSESSED AGAINST PETITIONER FOR ITS FAILURE TO FILE THE SPECIAL REPORTS REQUIRED BY THE COMMISSION

Section 6(b) of the Federal Trade Commission Act (*infra*, p. 72) authorizes the Commission to require corporations engaged in commerce to file with the Commission, in such form as it may prescribe, "annual or special * * * reports or answers in writing to specific questions, furnishing to the commission such

information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals * * *." Section 10 of the Act (*infra*, p. 74) provides that if any corporation "required * * * to file any annual or special report shall fail so to do * * * [it] shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure," such forfeiture to be recoverable in a civil suit by the United States.

The Commission, as part of a formal investigation instituted under Section 7 of the Clayton Act, ordered petitioner (and seven corporations which petitioner had recently acquired) to file nine special reports relating to these and other corporate acquisitions.[11] The orders directing the filing of the special reports specified in detail the information to be submitted, broken down into topics and sub-topics. In addition, petitioner was directed to submit designated

[11] The Commission issued its orders for special reports only after protracted and unsuccessful attempts to obtain the information voluntarily from petitioner. See the extensive correspondence between the Commission and petitioner set forth at pages 114–162 of the record. As the Commission stated in the district court (R. 266), this was the first time that the Commission was required to resort to such orders prior to the filing of a complaint. "[T]he use of the process of 6(b) has never before been necessary because of voluntary disclosures. Since 1950 over 400 alleged violations of Section 7 have been investigated and because of the full or substantial compliance with the requests of the Commission on a voluntary basis, there has never been a need for the use of either an order under Section 6(b) or a subpoena under Section 9 of the F.T.C. Act. In the continuing investigation of defendant, however, the Commission has felt it necessary to use both types of process."

documents, including copies of census reports. The nine orders for special reports called for the submission of 358 separate items of information or documentary material.

Prior to the filing of the action for penalties, petitioner had answered 52 (15 percent) of the items (see page 90, *infra*). The district court held that another 43 of them (12 percent) were "so indefinite as to be unenforceable" (R. 211). There were also 21 demands (6 percent) for copies of census reports, which may have been privileged but as to which the privilege had been waived (see Point I, *supra*). Thus, as of the time the action was filed, there were 95 items which were either invalid or with which petitioner had complied (116 items, if the census privilege was not waived). Petitioner was in default as to the remaining 263 items (or 242, if the census privilege was not waived), approximately two-thirds of the questions. See Appendix D, p. 91, black and shaded portions of chart.

In its post-trial memorandums in the district court, petitioner answered an additional 33 questions (9 percent). It also purported to answer 72 other questions (20 percent) by referring to documents which it had previously submitted, but without having indicated their pertinence to the specific inquiries posed by the Commission. While we think it clear that such post-trial answers cannot be included in determining the extent of petitioner's compliance prior to default, even if they are counted, petitioner was still in default on 137 items, or more than 38 percent. Indeed, even petitioner's own calculations, which include only the two orders directed to it and exclude the seven others

directed to its subsidiaries, show that petitioner had defaulted on 37 percent of all the questions and on 41 percent of the enforceable ones (Pet. Br. 3b, 4b).[14]

We submit that the court of appeals correctly held that petitioner, by such substantial non-compliance with the Commission's orders, incurred the statutory penalty for failure to submit special reports required by the Commission.

A. *Petitioner was Properly Subjected to Penalties for its Substantial Non-Compliance with the Commission's Orders.*

1. As the court of appeals pointed out (R. 229–230), this is not "a case involving a single oversight or an honest mistake in a good-faith attempt to comply with the Commission's order * * *. The facts before us suggest no such mitigating circumstances. The respondents cannot claim that theirs was merely an honest omission since they refused to accede to many of the Commission's requests for documents and information on the sole ground that the Commission had no authority to demand what was requested"—a contention that both the district court (R. 206–207) and the court of appeals (R. 224–227) correctly rejected.[14a] See *United States* v. *Morton Salt Co.*, 338 U.S. 632. Indeed, petitioner itself stated, in its brief in the district court (p. 42):

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[14] There is set forth in Appendix C, *infra*, pp. 80–90, a table showing, as to each of the 358 items in the nine Commission orders, petitioner's compliance or non-compliance, the time of compliance, and the district court's ruling. A graph summarizing this table is set forth in Appendix D, *infra*, p. 91.

[14a] Certiorari was denied on this issue (compare R. 237 with petition for certiorari, p. 3).

"Admittedly, most of the questions were reasonably straightforward and were capable of being answered."[14b]

The case, then, is one in which a litigant's failure to comply with an order results not from any honest mistake of judgment as to what is required, or from excusable error in a good faith attempt to comply, but from the decision to contest the authority of the tribunal. If that claim is rejected, however—as it was in this case—then the litigant incurs whatever penalty the law imposes for non-compliance. One who refuses to do what "the law requires * * * acts at his peril, in the sense that he must be held to the acceptance of any lawful consequences attached to the refusal" (*Life & Casualty Insurance Co.* v. *McCray*, 291 U.S. 566, 574).

The Act imposes a civil penalty upon any corporation "required * * * to file any * * * special report [which] fail[s] so to do." Petitioner itself admits that it never complied with at least one-third of the valid items called for in the reports, and the record shows that, when the time for compliance expired, petitioner had not complied with two-thirds of the items.[15] Petitioner never contended that it could not

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[14b] A copy of that brief has been lodged with the clerk of this Court.

[15] Petitioner refers to the district court's "refusal to enforce" 63 percent of the questions (Br. 9), states that "only 37% were held to be enforceable" (Br. 7), and makes similar statements throughout its brief (Br. 11, 18, 20). These statements are misleading to the extent they suggest that the district court held that 63 percent of the questions were invalid, and only 37 percent were valid. The district court actually held that only 43 questions, constituting only 12 percent of the total, were unenforceable (R. 211). The remaining 51 percent were not enforced not because they were invalid, but because petitioner had already answered them—a small

comply, and never sought additional time for compliance. It never attempted to seek immediate judicial review of the Commission's orders directing the submission of the special reports, although it could have done so (see *infra*, pp. 58–64). It merely complied with a small part of the orders, and then attempted to justify its non-compliance with the other parts by challenging their validity when called to account. In such circumstances, petitioner's non-compliance with a substantial portion of the orders directing the submission of special reports constituted a failure to file the reports within the meaning of the Act, and petitioner therefore is liable for the statutory penalties.

Bowman Dairy Co. v. *United States*, 341 U.S. 214, upon which petitioner relies (Br. 17–18), does not support its claim that the partial invalidity of the Commission's orders barred the assessment of the statutory penalties. In *Bowman Dairy*, a criminal antitrust case, the trial court enforced a *subpoena duces tecum*, obtained by the defendants, which directed the government to produce material it had obtained, "in any manner other than by seizure or process," during (1) a grand jury investigation and (2) preparation for trial. The government moved to quash, but the motion was denied. Acting under instructions from the Attorney General, the government attorney who had the material "respectfully declined to comply with the court's order," chiefly on the ground (also urged in the motion to quash) that a criminal

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part prior to default, and the remainder during the proceedings in the district court (R. 211; see *supra*, p. 51).

defendant's pre-trial discovery is limited by Rule 16 of the Federal Rules of Criminal Procedure to material obtained "by seizure or process." See the opinion of the court of appeals, 185 F. 2d 159, 161–162 (C.A. 7), and 341 U.S. at 218. The district court held the attorney in contempt and ordered him imprisoned until compliance with the subpoena, but the court of appeals reversed. 185 F. 2d 159. This Court held (p. 221) that the materials were subject to subpoena; it further held, however, that the last clause of the subpoena was invalid because it was so vague that it was "not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up." The Court then stated (*ibid.*):

> One should not be held in contempt under a subpoena that is part good and part bad. The burden is on the court to see that the subpoena is good in its entirety and it is not upon the person who faces punishment to cull the good from the bad.

The facts in *Bowman Dairy* were significantly different from those in the present case, and the broad language must be read in the light of the case then before the Court. *First*, in *Bowman* the government had exhausted all of its remedies when it moved to quash the subpoena; the order denying its motion was interlocutory and not appealable; and the only way in which the government could preserve its position was by declining to comply and then litigating the issue on appeal from a citation for contempt. In the present case, however, petitioner had an alternative remedy for testing the validity of the Commission's orders; it could promptly have instituted an appropri-

ate action in the district court (see *infra*, pp. 58–64). *Second*, in *Bowman*, the government attorney was forced to make the choice between obeying the court's order and thereby disobeying the order of his superior, the Attorney General, or obeying the order of the Attorney General and thereby disobeying the order of the court. Petitioner was not compelled to choose between conflicting obligations. *Third*, the considerations applicable to a contempt case, which involves loss of personal liberty by imprisonment for flouting of judicial authority, are different from those governing proceedings to collect statutory penalties from a corporation which fails to comply with its duty to file special reports with the Federal Trade Commission.

2. The district court, upon holding that portions of the orders were invalid, rejected petitioner's contention that it was required to strike down the entire set (R. 210). The court stated (*ibid.*) that, "[f]rom a practical point of view, this seems silly since it would require the Commission to redraw and reissue the same orders." The court concluded (*ibid.*) that "ordering partial compliance is a more practical method of dealing with these orders," and that Section 6(c) of the Administrative Procedure Act (5 U.S.C. 1005(c)) authorized such action. That section directs a court, in a proceeding challenging an agency subpoena, to sustain "any such subpoena *or similar process or demand* to the extent that it is found to be in accordance with law * * *" (emphasis added). The district court's action was plainly valid. See *National Labor Relations Board* v. *Anchor Rome Mills*, 197 F. 2d 447, 449 (C.A. 5).

Petitioner has abandoned its contention that the district court had no authority itself to direct compliance with the valid parts of the orders. It now argues (Br. 14–20) that the district court, by itself directing partial compliance with the orders, treated them as subpoenas; and that the legislative history of the Administrative Procedure Act shows that the only penalties Congress intended to impose for violation of administrative subpoenas were for contempt—penalties which accrue only after a litigant has had an opportunity to contest in court the validity of the subpoena. From these premises petitioner concludes that the statutory penalties are not applicable where the Commission's orders for special reports are held partially invalid.

This argument rests upon a confusion between the mechanics for enforcing part of a Commission order requiring special reports and the liability of a corporation for penalties for failure to submit such reports.[16] The various requests for information were severable. The small number held invalid were not so interrelated to, or dependent upon, the remaining requests as to make new orders out of the command to file reports. When the district court directed petitioner to comply with portions of the orders, it did not substitute its own order for the orders of the Commission. The court merely lent its authority to compel necessary obedience with the Commission's orders, as Section 9 of the Federal Trade Commission Act

[16] It also mistakenly assumes that petitioner could not have judicially challenged the orders prior to the penalty proceedings. See *infra*, pp. 58–64.

(*infra*, p. 72a) authorizes it to do. Petitioner incurred the penalties when it failed to file the reports ordered by the Commission, and neither the extent nor the method of subsequent judicial enforcement of the orders affected its liability therefor.

Nor is there any merit to petitioner's contention (Br. 22) that the court of appeals, instead of itself deciding that penalties were incurred, should have remanded the case to the district court to decide that question. The district court had held (R. 212) that since the orders were "partially defective," the government had no right to penalties. The court of appeals reversed that ruling, however, holding that petitioner's "wrong guess on a disputed issue of law does not prevent it from being held to 'lawful consequences attached to the refusal'" (R. 230). Since the court of appeals held that petitioner had incurred penalties, and since the statute sets the amount of such penalties at $100 a day for each day on default, there was no question remaining open on which a remand was necessary.

B. *Petitioner Could Have Timely Challenged the Commission's Orders by Instituting an Action in the District Court.*

1. Petitioner, relying on *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U.S. 160, argues (Br. 36–40) that it could not directly review the Commission's orders for special reports, but could challenge them only by way of defense to the suit for penalties, and that the imposition of penalties in such circum-

stances deprives it of its "liberty and property" without due process of law (Br. 36, 39). The court of appeals stated (R. 231) that the statutory procedure might not meet "established standards of due process" "[i]f judicial review were in fact limited to enforcement proceedings instituted by the Commission, and a daily forfeiture were collected for a failure to comply." It held (R. 231–232), however, that, prior to the institution of the government's suit for penalties, petitioner might have brought an action in the district court, under either the Declaratory Judgment Act or Section 10(e) of the Administrative Procedure Act, "to test the validity of an administrative agency's demand for a special annual report, when daily penalties may be assessed for failure to comply with any valid request," and that *Claire Furnace* did not bar such direct judicial review.

In the *Claire Furnace* case the Commission had ordered certain companies to file monthly reports under Section 6 of the Act, giving production costs, balance sheets and extensive corporate information. The reports were ordered in connection with a Congressional inquiry into the high costs of living, and there was no charge that any of the companies were violating the statutes which the Commission administered. The companies brought an equity action to enjoin the Commission from enforcing its orders, alleging that the agency had no authority to obtain the information for such purpose. The lower courts granted an injunction, but this Court reversed. It

stated 274 U.S. at 173–174) that "[t]here was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures"; that the companies would not be injured unless he instituted such a proceeding; and that, if he did so, the companies "would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now" and would "have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity."

Petitioner's reliance on *Claire Furnace* is self-defeating. For if that decision stands as a bar to direct injunctive or declaratory relief, then it necessarily also stands for the proposition that the opportunity to litigate the issue in the government's subsequent enforcement suit is an "adequate" "right" that satisfies due process. Conversely, if such subsequent opportunity to litigate is not an adequate opportunity to test the Commission's order, then the basis of the decision in *Claire Furnace* is no longer valid.

In any event, the court of appeals correctly held that *Claire Furnace* did not preclude direct judicial review of the Commission's orders in this case. The opinion in *Claire Furnace* considered the adequacy of the remedy in the subsequent government suit only in terms of a suit for mandamus; it did not discuss

the question whether the accrual of daily penalties for non-compliance would justify direct judicial review of an order for special reports. In *United States* v. *Morton Salt Co.*, 338 U.S. 632, this Court, in upholding the power of the Commission to require special reports showing how a corporation had complied with a court of appeals' order enforcing a Commission order under Section 5 of the Act, strongly intimated that direct review could be obtained to avoid accrual of penalties. It stated (p. 654):

> It is argued that if we sustain this use of § 6, the power will be unconfined and its arbitrary exercise subject to no judicial review or control, unless and until the Government brings suit, as here, for penalties. The Government, it is said, may delay such action while ruinous penalties accumulate and defendant runs the risk that his defenses will not be sustained. However, we are not prepared to say that courts would be powerless if after an effort to clarify or modify such an order it still is considered to be so arbitrary as to be unlawful and the Government pursues a policy of accumulating penalties while avoiding a judicial test by refusing to bring action to recover them. Since we do not think this record presents the question, we do not undertake to determine whether the Declaratory Judgment Act, the Administrative Procedure Act, or general equitable powers of the courts would afford a remedy if there were shown to be a wrong, or what the consequences would be if no chance is given for a test of reasonable objections to such an order. Cf. *Oklahoma Operating Co.* v. *Love*, 252 U.S. 331. It is enough to say that, in up-

> holding this order upon this record, we are not to be understood as holding such orders exempt from judicial examination or as extending a license to exact as reports what would not reasonably be comprehended within that term as used by Congress in the context of this Act.

The Declaratory Judgment Act and the Administrative Procedure Act, both of which were enacted after the decision in *Claire Furance*, permit direct review of a Commission order for special reports—particularly if the absence of such review might raise serious constitutional questions about the order. The broad language of the Declaratory Judgment Act (28 U.S.C. 2201), authorizing any court of the United States to "declare the rights and other legal relations of any interested party seeking such declaration," covers an action for a declaration of the validity of a Commission order under Section 6(b). See *Public Service Commission* v. *Wycoff Co.*, 344 U.S. 237, 241; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434; and the discussion of this issue by the court of appeals in this case, R. 231–232. Similarly, Section 10(e) of the Administrative Procedure Act (5 U.S.C. 1009(e)) sanctions review of such an order. It subjects to judicial review "[e]very agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court * * *." As the court of appeals pointed out (R. 232), while the Commission's order may not be a "final disposition" within the statutory definition of "order" in Section 2(d) of the Administrative Procedure Act (5 U.S.C. 1001(d)), it carries a "sanction" under 2(f)

(5 U.S.C. 1001(f)); and Section 2(g)(5 U.S.C. 1001 (g)) defines "agency action" as including the whole or part of "every agency * * * sanction * * *." Moreover, in view of the penal aspects of the statutory forfeitures, "the traditional use of equity proceedings to enjoin criminal proceedings" (*Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 306) might also justify the district court in prohibiting the institution of penalty proceedings for violation of orders it finds to be invalid.

In any event, since petitioner made no attempt to seek direct judicial review of the Commission's orders, it cannot now be heard to argue that, if it had done so, the court would not have entertained the suit. Cf. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37. Petitioner had ample time within which to institute such action. The first set of six Commission orders, calling for the filing of special reports within 30 days, was issued on January 9, 1959 (R. 9–41). As a result of petitioner's filing of a motion to vacate (R. 164–167), which the Commission denied (R. 170), the time for compliance was extended to May 28, 1959 (R. 170). The three reports called for by the second set of orders, issued on June 8, 1959, were due on July 8, 1959 (R. 44–53). The notices of default on the first set of orders were issued on June 18, 1959, three weeks after default occurred on May 28, 1959 (R. 53–55, 175–187); and the notices of default on the second set were issued on July 22, 1959, two weeks after default thereon (R. 56–58, 188–191).

Thus, six months elapsed between the issuance of the first orders and the notices of default on the last. Petitioner could have instituted an action to challenge the orders at any time during that period. Had it done so, it could also have sought a stay pending the determination of their validity. See 5 U.S.C. 1009(d). And, in view of the clear intimation in the *Morton Salt* case, *supra*, that such an action would lie, petitioner cannot claim that it refrained from seeking such relief because of its belief that *Claire Furnace* stood in the way.[17]

2. Alternatively, petitioner argues (Br. 39–40) that if *Claire Furnace* did not bar it from seeking judicial review of the Commission's orders, then both the court of appeals and this Court should have postponed the effective date of those orders pending the completion of judicial review, including the proceed-

[17] Petitioner states (Br. 39–40) that the Commission discouraged it from instituting such an action. The contention is based on the fact that, in response to a letter from petitioner asking whether members of the Commission would submit to the jurisdiction of the District Court for the Southern District of New York in a suit for declaratory judgment and injunctive relief (R. 197), the Commission's general counsel replied that, if such a suit were filed, the Commission "would be compelled to note the probable lack of jurisdiction in the Court upon the authority of" the *Claire Furnace* case (R. 200).

Petitioner's letter, however, was not sent until August 31, 1959, after the notices of default had been issued. The filing of an action at that time would hardly have been a timely challenge to the Commission's orders. Moreover, the fact that the Commission believed that *Claire Furnace* "probably" barred such a suit did not excuse petitioner from bringing it and litigating the question.

ings in this Court.[18] Since acceptance of this argument would mean that, even though this Court agrees with the court of appeals that petitioner incurred penalties, they would not begin to accrue until after this Court's decision, petitioner is really arguing that, since it secured delay by omitting to bring suit, the Commission's suit for penalties should be treated as if it were the suit which petitioner omitted. Obviously this is only a complex way of saying that penalties for serious non-compliance should not begin to run until the validity of the order has been litigated by a suit for penalties. The arguments we have previously made to show that penalties were properly assessed also compel the rejection of this form of the argument. See also *United States* v. *Clyde S. S. Co.*, 36 F. 2d 691, 694 (C.A. 2).

C. *The Orders Called for the Filing of "Special Reports", Even Though Such Reports Required Answers to Specific Questions.*

Section 6(b) of the Act authorizes the Commission to require the filing of "annual or special * * * reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to" various business practices. Section 10 imposes forfeitures upon any corporation that fails to file any required "annual or special report". Petitioner argues (Br. 23–27) that since the reports it was ordered to file called for answers to specific

[18] In its order granting certiorari (limited to certain questions), this Court stayed the further accumulation of forfeitures from February 7, 1961, the date on which the petition was filed (R. 238). The order further stated (*ibid.*) that "[p]etitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation."

questions, they ceased to be "special reports" within the meaning of Section 6(b); and that a corporation that fails to furnish "answers * * * to specific questions" is not liable for penalties, but is subject only to a proceeding to compel it to answer.

But a "special report" does not cease to be such merely because the Commission specifies particular information to be supplied and calls for answers to specific questions. Each of the orders directed the filing of a "special report" (R. 9, 23, 27, 30, 34, 38, 44, 46, 49–50) and, in addition to the specific questions asked, also required the submission of designated documents. The orders plainly called for "special reports" as that term is used in Section 6(b). Any order for a special report must detail with specificity what information is required, in order to enable the recipient to understand what it must furnish. The House Committee Report on the Act, speaking of what became Section 6(b), stated (H. Rep. No. 533, 63d Cong., 2d Sess., p. 4): "The commission, under this section, may also require such special reports as it may deem advisable. By this means, if the ordinary data furnished by a corporation in its annual reports does not adequately disclose its organization, financial condition, business practices, or relation to other corporations, there can be obtained by a special report such additional information as the commission may deem necessary." But the only way in which the Commission can insure that the special report will provide "such additional information as [it] may deem necessary" is by asking for the specific information

required. The simplest—and best—method for obtaining that information is by asking specific questions.

There is no basis for petitioner's contention that Congress intended to draw such a distinction between special reports and answers to specific questions, and that it intended the statutory penalties to apply only to the former, and not to the latter. On the contrary, both the legislative history of Section 6(b), and the general design of the statute, indicate that the phrase "answers in writing to specific questions" merely illustrates what the Commission may call for in a "special report". And, when Congress provided penalties in Section 10 for failure to file special reports, it also covered failure to answer the specific questions asked in an order to file special reports.

The present language in Section 6(b) was written by the House and Senate conferees. As passed by the Senate, the bill would have authorized the Commission (1) to require corporations " to furnish to the commission from time to time information, statements, and records concerning its organization, business, financial condition, conduct, practices, management, and relation to other corporations, or to individuals, associations, or partnerships" (Section 3(b)), and (2) to prescribe "a uniform system of annual reports * * * and * * * require such reports, *or any special report,* to be made under oath, or otherwise in the discretion of the commission" (Section 3(c), emphasis added). The bill included the present penalty of $100 a day for default in filing "any annual or special report" (Section 6). S. Rep. No. 597, 63d Cong., 2d

Sess., pp. 2–4. The earlier House bill had similar provisions, but would have *required* corporations of a certain size to file annual reports. H. Rep. No. 533, Pt. 3, 63d Cong., 2d Sess., pp. 13–15. In both bills, "special report" clearly was a catch-all phrase designed to enable the Commission to obtain "information, statements and records" that might not be included in annual reports.

The conference adopted the Senate approach of giving the Commission authority to require the submission of annual reports, rather than the House approach of providing in the bill for a mandatory filing. It added the phrase "answers in writing to specific questions" to the provision defining the scope of the Commission's authority to require special and annual reports, but left the penalty provision unchanged. The explanation of the conference report to the Congress, however, makes it clear that the grant of specific authority to the Commission to require answers to specific questions was not intended to make any change of substance in the Senate Bill, but was merely some clarifying "new phraseology." See 51 Cong. Rec. 14768, 14925–14926. The only distinction that Section 6(b) draws is between annual and special reports, and the Commission may require "answers in writing to specific questions" as part of either.

Petitioner's argument would lead to the anomalous result that penalties would be imposed only for

failure to file a response to a broad general inquiry, but not for failure to answer specific questions. The purpose of the $100-a-day forfeiture for non-submission of reports is to "furnish sufficient inducement to compliance with requests for information" (*United States* v. *Clyde S.S. Co.*, 36 F. 2d 691, 694 (C.A. 2)). Answers to specific questions may be far more useful and important to the Commission in the performance of its regulatory functions than responses to a general inquiry. Congress did not limit penalties to failure to respond to the latter inquires; it also penalized failure to answer specific questions.[19]

CONCLUSION

If this Court holds that petitioner waived any claim that the retained copies of the census reports are privileged, the judgment of the court of appeals should be affirmed in its entirety. If this court holds that the claim of privilege has not been waived, the judgement of the district court should be modified to eliminate the direction that petitioner comply with those provisions of the orders directing the submission of retained copies of census reports and, as thus

[19] To the extent that *United States* v. *National Biscuit Co.*, 25 F. Supp. 329 (S.D.N.Y.), is contrary to this view, we believe it to be erroneous. Indeed, the court of appeals stated in the present case that "it is by no means certain that we would have agreed with the district court's disposition of that case had it been appealed" (R. 230).

modified, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

I. The Census Act

Section 9, 13 U.S.C. 9: Information as confidential; exception.

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may, except as provided in section 8 of this title—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

(b) The provisions of subsection (a) of this section relating to the confidential treatment of data for particular individuals and establishments, shall not apply to the censuses of governments provided for by subchapter III of chapter 5 of this title, nor to interim current data provided for by subchapter IV of chapter 5 of this title as to the subjects covered by censuses of governments, with respect to any information obtained therefor that is compiled from, or customarily provided in, public records.

SECTION 132, 13 U.S.C. 132: CONTROLLING LAW; EFFECT ON OTHER AGENCIES.

To the extent that the provisions of this subchapter IV of this chapter conflict with any other provision of this title or other law, pertaining to the Secretary or the Department of Commerce, the provisions of this title shall control; but nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information.

II. THE FEDERAL TRADE COMMISSION ACT, 38 STAT. 717

SECTION 6, 15 U.S.C. 46: ADDITIONAL POWERS OF COMMISSION.

The commission shall also have power—

(a) *Investigation of corporations.*

To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships. .

(b) *Reports by corporations.*

To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, fur-

nishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

* * * * *

SECTION 9, 15 U.S.C. 49: DOCUMENTARY EVIDENCE; DEPOSITIONS; WITNESSES.

For the purposes of sections 41–46 and 47–58 of this title the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a

subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41–46 and 47–58 of this title or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under said sections at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be com-

pelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpoena of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpoena issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

SECTION 10, 15 U.S.C. 50: OFFENSES AND PENALTIES.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent ju-

risdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under sections 41–46 and 47–58 of this title, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to said sections, or who shall willfully neglect or fail to make, or to cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000, or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by sections 41–46 and 47–58 of this title to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of

such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various United States attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Any officer or employee of the commission who shall make public any information obtained by the commission without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine not exceeding $5,000, or by imprisonment not exceeding one year, or by fine and imprisonment, in the discretion of the court.

III. The Administrative Procedure Act, 60 Stat. 237

Section 6(c), 5 U.S.C. 1005(c): Subpoenas and production of evidence.

Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a rea-

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sonable time under penalty of punishment for contempt in case of contumacious failure to comply.

SECTION 10, 5 U.S.C. 1009: JUDICIAL REVIEW OF AGENCY ACTION.

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of review.*

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and venue of proceedings.*

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Acts reviewable.*

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review

upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) *Relief pending review.*

Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) *Scope of review.*

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclu-

sions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

IV. THE DECLATORY JUDGMENT ACT, 28 U.S.C. 2201: CREATION OF REMEDY.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

DUPLICATE

Form M-26A

U. S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1958 CENSUS OF MANUFACTURES

PULP, PAPER, AND BOARD

CONFIDENTIAL.—This report is required by Act of Congress, approved August 31, 1954 (13 U.S.C. 131 and 224). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation.

MC-26A (2601)

CENSUS USE ONLY

Location

0-1 0-2

KEEP THIS COPY FOR YOUR FILES

PLEASE READ ENCLOSED INSTRUCTIONS BEFORE COMPLETING REPORT

Please complete and return this form in the return envelope to the Bureau of the Census, Jeffersonville, Indiana, **not later than 30 days** after you receive it.

ITEM 1A NAME OF ESTABLISHMENT

NAME

(In answering item 1B, parts (1) through (5) below, be sure your answers relate to the ACTUAL PHYSICAL LOCATION of your establishment, which may be different from its mailing address.)

ITEM 1B LOCATION OF ESTABLISHMENT

1. STATE 2. COUNTY

3. Is this establishment within the legal boundary of a municipality? Yes ☐ No ☐

If Yes,
(a) Enter name of the municipality (Enter name only if establishment is within legal boundary)

(b) Type of municipality (Check applicable box)
☐ City ☐ Village ☐ Borough
☐ Other (Specify)

4. STREET AND NUMBER OF ESTABLISHMENT'S LOCATION (If establishment's location cannot be described by street and number, give name and number of any of road or highway and not known information to locate establishment, e.g., R. 35, 3 miles South of Clarksville)

For establishments in the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, and Pennsylvania

5. Is this establishment within a town or township? Yes ☐ No ☐

If YES, [illegible] NAME OF TOWN OR TOWNSHIP

ITEM 2A FEDERAL SOCIAL SECURITY EMPLOYER IDENTIFICATION NUMBER

(Please correct any er...)

Federal Social Security Employer Identification Number of this establishment (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)

[illegible] Enter all 9 digits

ITEM 2B COMPANY ORGANIZATION

a. Does this company operate more than one place of business under the same Employer Identification Number (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)? Yes ☐ No ☐

b. Does this company own or control another company? Yes ☐ No ☐

c. Is this company owned or controlled by another company? Yes ☐ No ☐
If Yes, (a) checked in Part (c), give name and address of owning or controlling company

ITEM 2C FORM OF OWNERSHIP

Check one

(1) ☐ Individual proprietor
(2) ☐ Partnership (Specify number of working partners ____)
(3) ☐ Corporation (Do not include any form of coop. ass'n.)
8 ☐ Cooperative association (corporate or noncorporate)
(9) ☐ Other (Specify)

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers.—Workers (up through the working foreman level) engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

All Other Employees.—Nonproduction personnel at this establishment, including those engaged in the following activities: factory supervision (above working foreman level), sales (including driver salesmen), sales delivery (highway truck drivers and their helpers), advertising, credit, collection, installation and servicing of own products, clerical and routine office functions, executive, purchasing, finance, legal, personnel (including cafeteria, medical, etc.), professional and technical. **Include** force account construction employees on your payroll engaged in construction of major additions or alterations to the plant who are utilized as a separate work force. Workers engaged in regular maintenance and repair operations should be included with production workers.

ITEM 3 PAYROLLS ($000)

Enter the total of wages, salaries, bonuses, commissions and other remunerations in 1958, before deductions, paid to—

	1958 Thousands of dollars	KEY
a. Production workers	$	0-5
b. All other employees	$	0-6
c. **Total payrolls** (Sum of a and b)	$	0-7

ITEM 4 NUMBER OF EMPLOYEES

Production workers during pay period ended nearest 15th of—

See definitions above Item 3

	Number of employees	
a. March 1958		0-8
b. May 1958		0-9
c. August 1958		0-10
d. November 1958		1 1-1

LOCATION OF ESTABLISHMENT

3. Is this establishment within the legal boundaries of a municipality? Yes ☐ No ☐

If Yes,

(a) Enter name of the municipality. Enter name only if establishment is within legal boundaries.

(b) Type of municipality. Check applicable box.

☐ City ☐ Village ☐ Borough

☐ Other (Specify)

4. STREET AND NUMBER OF ESTABLISHMENT (Location of main entrance should be described by street and number, e.g. name and number of road or highway, distance from intersection of nearest established streets, e.g. 2 mi. E. of town hall on State Route 10)

For establishments in New England, New Jersey and Pennsylvania

5. Is this establishment within a town or township? Yes ☐ No ☐

If YES, ENTER NAME OF TOWN OR TOWNSHIP

COMPANY ORGANIZATION

[illegible] Yes ☐ No ☐

[illegible] Yes ☐ No ☐

[illegible] Yes ☐ No ☐

ITEM 2

FORM OF OWNERSHIP

1 ☐ Individual proprietorship

4 ☐ Partnership. Specify number of working partners

0 ☐ Corporation. Do not include any form of cooperative

8 ☐ Cooperative association. Incorporated or unincorporated

9 ☐ Other. Specify

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers. — Workers up through the working foreman level engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

All Other Employees. — Nonproduction personnel at this establishment, including those engaged in the following activities: factory supervision above working foreman level; sales (including driver salesmen), sales delivery, highway truck drivers and their helpers; advertising; credit; collection; installation and servicing of own products; clerical and routine office functions; executive; purchasing; finance; legal; personnel (including cafeteria, medical, etc.); professional and technical. **Include** force account construction employees on your payroll engaged in construction of major additions or alterations to the plant who are utilized as a separate work force. Workers engaged in regular maintenance and repair operations should be included with production workers.

ITEM 3 PAYROLLS ($000)

Enter the total of wages, salaries, bonuses, commissions, and other remunerations in 1958, before deductions, paid to—

		1958 Thousands of dollars	
a.	Production workers	$	0-5
b.	All other employees	$	0-6
c.	**Total payrolls** (Sum of a and b)	$	0-7

ITEM 4 NUMBER OF EMPLOYEES

		Number of employees	
	Production workers during pay period ended nearest 15th of— (See definitions above for 1)		
a.	March 1958		0-8
b.	May 1958		0-9
c.	August 1958		0-10
d.	November 1958		1-1
e.	Sum of items b, c, and d		1-2
f.	Average number. Divide sum on line e by 4		1-3
	All other employees during pay period ended nearest (See definitions above for 1)		
g.	All other employees, March 15, 1958		1-4
h.	**Total.** Sum of f and g		1-5

ITEM 5 PLANT MAN-HOURS OF PRODUCTION WORKERS BY QUARTER (Thousands)

Enter the total number of plant man-hours of production workers as defined above for each calendar quarter of comparable 13 weeks period of 1958. Do not include hours on paid vacations, holidays or sick leave.

		Thousands of hours	
a.	January through March 1958		1-6
b.	April through June 1958		1-7
c.	July through September 1958		1-8
d.	October through December 1958		1-9
e.	**Total production worker man-hours** (Sum of a, b, c, and d)		1-10

OVER

ORIGINAL Return this copy to Bureau of the Census

Form approved. Budget Bureau No. 41-S810.

Form MC-26A

U. S. DEPARTMENT OF COMMERCE
BUREAU OF THE CENSUS

1958 CENSUS OF MANUFACTURES

PULP, PAPER, AND BOARD

CONFIDENTIAL. — This report is required by Act of Congress, approved August 31, 1954 (13 U.S.C. 131 and 224). Your report is confidential and only sworn Census employees will have access to it. It cannot be used for purposes of taxation, investigation or regulation.

In correspondence pertaining to this report please refer to this file number _____

(Please correct any errors in name and address)

0		Location	
0-1		0-2	

PLEASE READ ENCLOSED INSTRUCTIONS BEFORE COMPLETING REPORT.

Please complete and return this form in the return envelope to the Bureau of the Census, Jeffersonville, Indiana, not later than 30 days after you receive it.

ITEM 1A NAME OF ESTABLISHMENT — Name

ITEM 2A FEDERAL SOCIAL SECURITY EMPLOYER IDENTIFICATION NUMBER — Federal Social Security Employer Identification Number of this establishment (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)

Give all 9 digits

ITEM 1B LOCATION OF ESTABLISHMENT

In answering Item 1B, parts (1) through (5) below, be sure your answers relate to the ACTUAL PHYSICAL LOCATION of your establishment, which may be different from its mailing address.

a. State | b. County

3. Is this establishment within the legal boundary of a municipality? Yes ☐ No ☐

If "Yes,"

(a) Enter name of the municipality. (Enter name only if establishment is within legal boundary)

(b) Type of municipality. (Check applicable box)
☐ City ☐ Village ☐ Borough
☐ Other (Specify) _____

4. STREET AND NUMBER OF ESTABLISHMENT LOCATION. If establishment cannot be described by street and number, give name and number of entry, if any, of road or highway, and full known information to locate establishment, e.g., R. No. 3, 3 miles South of Clarksville.

5. Is this establishment within a town or township? Yes ☐ No ☐

If "Yes," Enter name of town or township

ITEM 2B COMPANY ORGANIZATION

a. Does this company operate more than one place of business under the same Employer Identification Number (Item 10 of Employer's Quarterly Tax Report, Treasury Form 941)? Yes ☐ No ☐

b. Does this company own or control another company? Yes ☐ No ☐

c. Is this company owned or controlled by another company? Yes ☐ No ☐

If "Yes," is checked in Part (c), give name and address of owning or controlling company.

ITEM 3. FORM OF OWNERSHIP — Check one.

(1) ☐ Individual proprietor
(2) ☐ Partnership (Specify number of working partners _____)
(3) ☐ Corporation (Do not include any form of coop. assn.)
(4) ☐ Cooperative association (corporate or nonprofit)
(9) ☐ Other (Specify) _____

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers. — Workers (up through the working foreman level) engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

All Other Employees. — Nonproduction personnel of this establishment, including those engaged in the following activities: factory supervision above working foreman level, sales (including driver salesmen), sales delivery (highway truck drivers and their helpers), advertising, credit, collection, installation and servicing of own products, clerical and routine office functions, executive, purchasing, finance, legal, personnel (including cafeteria, medical, etc.), professional and technical. Include force account construction employees on your payroll engaged in construction of minor additions or alterations to the plant who are utilized as a separate work force. Workers engaged in regular maintenance and repair operations should be included with production workers.

ITEM 5 PAYROLLS (1958)

Enter the total of wages, salaries, bonuses, commissions, and other remunerations in 1958, before deductions, paid to—

	1958 Thousands of dollars	KEY
a. Production workers	$	0-5
b. All other employees	$	0-6
c. **Total payrolls** (Sum of a and b)	$	0-7

ITEM 4 NUMBER OF EMPLOYEES

Production workers during pay period ended nearest 15th of—

	Number of employees	
a. March 1958		0-8
b. May 1958		0-9
c. August 1958		0-10

ESTABLISHMENT

8. Is this establishment within the legal boundaries of a municipality? Yes ☐ No ☐

If Yes,

(a) Enter name of the municipality. (Enter name only if establishment is within legal boundary.)

(b) Type of municipality. (Check applicable box.)
☐ City ☐ Village ☐ Borough
☐ Other. Specify:

9. Is this establishment within a town or township? Yes ☐ No ☐

If Yes, enter name of town or township.

COMPANY ORGANIZATION

Does this company operate more than one place of business under the same Employer Identification Number (Item 10 of Employer's Quarterly Tax Report Treasury Form 941)? Yes ☐ No ☐

Is this company owned or controlled by another company? Yes ☐ No ☐

If Yes, enter name and address of owning or controlling company.

ITEM X FORM OF OWNERSHIP

Check one.

1 ☐ Individual proprietor
2 ☐ Partnership (Specify number of working partners)
3 ☐ Corporation (Do not include any form of coop. assn.)
8 ☐ Cooperative association (corporate or noncorporate)
9 ☐ Other. Specify:

DEFINITIONS FOR ITEMS 3, 4, AND 5

Production Workers.—Workers up through the working foreman level engaged in fabricating, processing, assembling, inspection, receiving, storage, handling, packing, warehousing, shipping (but not delivering), maintenance, repair, janitorial, watchman services, product development, auxiliary production for plant's own use (e.g., power plant), record keeping, and other services closely associated with these production operations. Exclude supervisory employees above working foreman level.

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ITEM 3 PAYROLL DATA

Enter the total of wages, salaries, bonuses, commissions, and other remunerations in 1958, before deductions, paid to—

	1958 Thousands of dollars	
a. Production workers	$	3-a
b. All other employees	$	3-b
c. Total payrolls (Sum of a and b)	$	3-c

ITEM 4 EMPLOYMENT DATA

	Number of employees	
Production workers during pay period ended nearest 15th of— (See definitions above Item 3.) a. March 1958		4-a
b. May 1958		4-b
c. August 1958		4-c
d. November 1958		4-d
e. Sum of items a, b, c, and d		4-e
f. Average number (Divide sum on line e by 4)		4-f
All other employees during pay period ended nearest (See definitions above Item 3) g. All other employees, March 15, 1958		4-g
h. Total (Sum of f and g)		4-h

ITEM 5 PRODUCTION WORKER MAN-HOURS

Enter the total number of plant man-hours of production workers (as defined above) for each calendar quarter (or comparable 13-week period) of 1958. Do not include hours for paid vacations, holidays or sick leave.

	Thousands of hours	
a. January through March 1958		5-a
b. April through June 1958		5-b
c. July through September 1958		5-c
d. October through December 1958		5-d
e. Total production worker man-hours (Sum of a, b, c, and d)		5-e

(OVER)

APPENDIX C

Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum [1]		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1:						
1(a)					X	
1(b)	X					
1(c)			X			
1(d)	X					
1(e)			X			X
1(f)			X			X
1(g)			X			
1(h)		X				
1(i)			X			X
2(a)			X			
2(b)					X	
2(c)			X			
2(d)				X		
2(e)				X		
3(a)	X					
3(b)			X			
3(c)	X					
3(d)			X			
3(e)(1)	X					
3(e)(2)	X					
3(e)(3)					X	
3(f)			X			
3(g)(1)					X	
3(g)(2)					X	
3(h)(1)					X	
3(h)(2)			X			
3(i)			X			
3(j)		X				

[1] ***Defendant's Comments on Specifications of Default***, submitted by St. Regis in response to the Government's post-trial memorandum required by the district court. These documents are lodged with the Court.

Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals—Continued

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1—Continued						
3(k)		X				
5(a)[3]			X			
5(b)			X			
5(c)			X			
5(d)	X					
5(e)(1)	X					
5(e)(2)	X					
5(f)			X			
5(g)					X	
5(h)			X			
5(i)			X			
5(j)		X				
5(k)		X				
6(a)			X			
6(b)			X			
6(c)			X			
6(d)			X			
6(e)			X			
6(f)			X			
6(g)	X					
6(h)			X			
6(i)			X			
6(j)		X				
6(k)				X		
7(a)			X			
7(b)			X			
7(c)			X			
7(d)			X			
7(e)			X			
7(f)			X			
7(g)			X			
7(h)			X			
7(i)	X					
7(j)		X				
7(k)	X					
8(a)			X			

[3] There is no ¶ 4 in order 1.

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1—Continued						
8(b)			X			
8(c)	X					
8(d)			X			
8(a)(1)			X			
8(e)(2)	X					
8(e)(3)			X			
8(f)			X			
8(g)(1)					X	
8(g)(2)					X	
8(g)(3)					X	
8(h)(1)			X			
8(h)(2)			X			
8(i)			X			
8(j)		X				
8(k)	X					
9(a)	X					
9(b)			X			
9(c)					X	
9(d)	X					
9(e)(1)	X					
[illegible]					X	
[illegible](3)	X					
[illegible]					X	
[illegible]	X					
[illegible]			X			
[illegible]					X	
[illegible]d)	X					
10(e)(1)					X	
10(e)(2)					X	
10(e)(3)	X					
10(f)					X	
11(a)		X				
11(b)		X				
11(c)		X				
11(d)		X				
11(e)		X				

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 1—Continued						
11(f)		X				
11(g)		X				
11(h)		X				
11(i)		X				
11(j)		X				
11(k)		X				
11(l)		X				
12(a)				X		
12(b)				X		
12(c)				X		
12(d)				X		
13(a)				X		
13(b)(1)				X		
13(b)(2)				X		
14(a)(1)				X		
14(a)(2)				X		
14(a)(3)				X		
14(a)(4)				X		
14(a)(5)				X		
14(a)(6)				X		
14(a)(7)				X		
14(b)(1)				X		
14(b)(2)				X		
14(b)(3)				X		
14(b)(4)				X		
14(b)(5)				X		
14(b)(6)				X		
14(b)(7)				X		
14(c)(1)				X		
14(c)(2)				X		
14(c)(3)				X		
15(a)				X		
15(b)				X		
Subtotals 139	22	20	45	29	17	3

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 2:						
1	X					
2(a)					X	
2(b)			X			
2(c)					X	
2(d)			X			
2(e)					X	
2(f)(1)				X		
2(f)(2)				X		
2(f)(3)				X		
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)	X					
4(b)			X			
4(c)			X			
4(d)	X					
4(e)	X					
5(a)(1)					X	
5(a)(2)					X	
5(a)(3)					X	
5(b)(1)			X			
5(b)(2)			X			
6(a)(1)			X			
6(a)(2)			X			
6(a)(3)			X			
6(a)(4)			X			
6(a)(5)			X			
6(a)(6)			X			
6(a)(7)			X			
6(b)			X			
6(c)(1)			X			
6(c)(2)			X			
6(c)(3)			X			
7(a)		X				
7(b)		X				
8		X				
Subtotals	37	4	4	20	3	6	2

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 3:						
1	X					
2(a)					X	
2(b)			X			
2(c)					X	
2(d)			X			
2(e)	X					
2(f)(1)					X	
2(f)(2)					X	
2(f)(3)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)	X					
4(b)					X	
4(c)	X					
4(d)	X					
5(a)					X	
5(b)					X	
5(c)			X			
5(d)			X			
5(e)			X			
6(a)(1)					X	
6(a)(2)					X	
6(a)(3)					X	
6(a)(4)					X	
6(a)(5)					X	
6(a)(6)					X	
6(a)(7)					X	
6(b)					X	
6(c)(1)					X	
6(c)(2)					X	
6(c)(3)			X			
7(a)		X				
7(b)		X				
8		X				
Subtotals 36	5	4	9	0	18	2

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum		Census data involved (included also under col. 4).
				Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	
Order 4:						
1					X	
2(a)	X					
2(b)			X			
2(c)	X					
2(d)					X	
2(e)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)			X			
4(b)			X			
4(c)			X			
4(d)			X			
4(e)			X			
4(f)			X			
5(a)	X					
5(b)(1)			X			
5(b)(2)			X			
5(c)			X			
6(a)		X				
6(b)		X				
7		X				
Subtotals 23	3	4	13	0	3	2
Order 5:						
1	X					
2(a)					X	
2(b)			X			
2(c)	X					
2(d)					X	
2(e)			X			
3(a)(1)			X			X
3(a)(2)			X			
3(b)			X			
3(c)		X				
3(d)			X			X

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
				Enforcement unnecessary because answered in petitioner's post-trial memorandum		
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 5—Continued						
4(a)(1)	X					
4(a)(2)	X					
4(a)(3)	X					
4(a)(4)	X					
4(a)(5)	X					
4(a)(6)	X					
4(a)(7)	X					
4(b)(1)					X	
4(b)(2)			X			
4(c)			X			
4(d)					X	
4(e)			X			
5(a)(1)			X			
5(a)(2)			X			
5(a)(3)			X			
5(a)(4)			X			
5(a)(5)			X			
5(a)(6)			X			
5(a)(7)			X			
5(a)(8)			X			
5(a)(9)			X			
5(a)(10)			X			
5(b)			X			
5(c)			X			
5(d)			X			
5(e)(1)					X	
5(e)(2)					X	
5(e)(3)					X	
5(f)			X			
5(g)					X	
6(a)		X				
6(b)		X				
7		X				
Subtotal 44	9	4	23	0	8	2
Order 6:						
1	X					
2(a)					X	
2(b)			X			

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
Order, Paragraph	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum		Census data involved (included also under cpl. 4).
				Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	
Order 6—Continued						
2(c)			X			
2(d)(1)			X			
2(d)(2)			X			
2(d)(3)			X			
2(d)(4)			X			
2(d)(5)			X			
2(d)(6)			X			
2(e)			X			
2(f)	X					
2(g)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)(1)			X			
3(d)(2)			X			X
4(a)					X	X
4(b)(1)					X	
4(b)(2)			X			
4(c)			X			
5(a)	X					
5(b)					X	
6		X				
Subtotal 25	3	2	15	0	5	3
Order 7						
1(a)			X			
1(b)					X	
1(c)			X			
1(d)	X					
2(a)			X			X
2(b)			X			X
3(a)			X			
3(b)			X			
3(c)			X			
4(a)			X			
4(b)			X			
4(c)					X	
5		X				
Subtotal 13	1	1	9	0	2	2

***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum		Census data involved (included also under col. 4).
				Answers furnished in memorandum	Answers furnished in memorandum by reference to documents previously submitted	
Order 8:						
1	X					
2(a)					X	
2(b)			X			
2(c)					X	
2(d)				X		
2(e)					X	
2(f)(1)					X	
2(f)(2)					X	
2(f)(3)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)			X			X
4(a)	X					
4(b)			X			
4(c)	X					
5(a)(1)					X	
5(a)(2)					X	
5(b)(1)					X	
5(b)(2)					X	
5(b)(3)					X	
5(b)(4)			X			
5(b)(5)			X			
6(a)			X			
6(b)			X			
7		X				
Subtotals 26	3	2	9	1	11	2

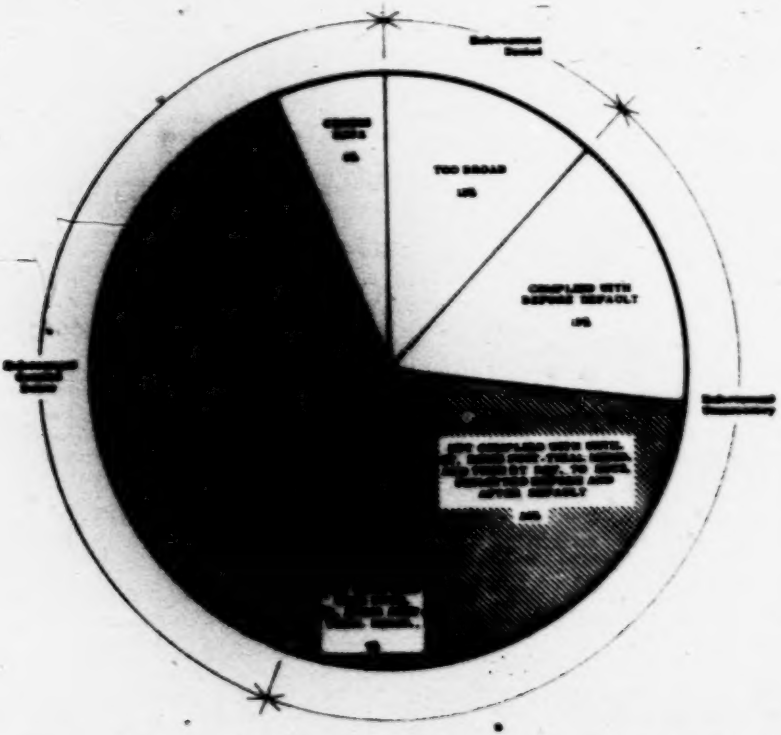
***Tabulation of the contents of the nine orders in terms of compliance, enforceability, and enforcement as determined by district court and affirmed by court of appeals*—Continued**

1	2	3	4	5	6	7
	NO DEFAULT		DEFAULT ON ITEMS HELD VALID BELOW			
Order, Paragraph	Adequate predefault compliance.	No compliance. Order held improperly broad. Enforcement denied by district court.	Enforcement necessary and granted by district court	Enforcement unnecessary because answered in petitioner's post-trial memorandum: Answers furnished in memorandum	Enforcement unnecessary because answered in petitioner's post-trial memorandum: Answers furnished in memorandum by reference to documents previously submitted	Census data involved (included also under col. 4).
Order 9:						
1			X			
2(a)			X			
2(b)			X			
2(c)			X			
2(d)			X			
2(e)					X	
3(a)			X			X
3(b)			X			
3(c)		X				
3(d)(1)			X			X
3(d)(2)			X			X
4(a)			X			
4(b)(1)	X					
4(b)(2)					X	
4(b)(3)	X					
4(c)			X			
5(a)			X			
5(b)			X			
6(a)			X			
6(b)			X			
7		X				
Subtotals 21	2	2	15	0	2	3
Grand totals:						
Number 358	52	43	158	33	72	21
Percent 100	15	12	44	9	20	6
			263 73%			

Source: R. 211-16; *Specifications of Default; Defendant's Comments on Specifications of Default.*

APPENDIX D

The status and disposition below of the 358 items in the 9 orders:



Source: This chart is based on the totals in Appendix C, which is in turn based on the opinion of the district court, the stipulation of facts, and St. Regis' post-trial memorandum setting out its version of the facts of compliance (accepted as correct here). The segments of the chart, reading clockwise from the 12 o'clock position, correspond respectively to columns 3, 2, 6, 5, 4 (less 7), and 7 of Appendix C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER ST. REGIS PAPER COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER ST. REGIS PAPER COMPANY

Statement

The Government's brief presents as the major issue on this review the question whether petitioner was bound to furnish the Federal Trade Commission (the "Commission") petitioner's retained file copies of confidential reports to the Bureau of the Census for the Census of Manufactures (Gov. Br. p. 14). This, of course, relates to question number "5" in the order granting certiorari (R. 237). On this question the Solicitor General's position is in accord with the petitioner's, i.e., that the petitioner's retained reports to the Census of Manufactures are confidential, privileged documents and that to the extent it requires the production of these documents

the judgment of the Court below should be reversed (Gov. Br. pp. 27, 46 and 49).*

In the view of the petitioner, questions number "2", "3" and "6" stated in the order allowing review (R. 237) present novel issues of wide public interest which are equally as important as question number "5".

In its brief the Government has presented a completely new question which, for the first time in this entire proceeding, raises the issue whether petitioner waived its claim of confidential privilege regarding its retained file copies of reports to the Bureau of Census (Gov. Br. pp. 8, 15, 16 and 27). In the Government's brief this additional question has been argued at length.

The additional question has been improperly raised in violation of a rule of this Court (Rule 40(1) (d) (2)), is contrary to the common law rule that questions not considered below cannot be raised in an appellate court and is founded upon an incorrect statement of the facts, as hereinafter shown.

We shall also show that the argument in the Government's brief on the claims for forfeitures is without merit.

---

* This is consistent with the view of the Solicitor General's predecessor. In the petition to this Court for certiorari in *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739 (7th Cir. 1960), *cert. denied* 364 U. S. 882 (1960), Solicitor General J. Lee Rankin did not sign the petition and in a separate statement annexed to such petition, at pages 14 and 15, stated the following:

> "The Federal Trade Commission and the Antitrust Division of the Department of Justice believe that the decision below is erroneous, raises questions of substantial importance in the enforcement of antitrust and other regulatory laws, and warrants review by this Court. On the other hand, the Bureau of the Census and the Bureau of the Budget believe that the decision below is correct and should not be reviewed by this Court. Accordingly, I am authorizing the filing of this petition for a writ of certiorari without signing it and therefore not supporting it.
>
> J. LEE RANKIN,
> Solicitor General."

I

The Government may not present for the first time on this review the issue whether petitioner has waived its privilege that its retained file copies of reports for the census of manufactures must be accorded confidential treatment and are not subject to the Commission's investigative process.

This Court's Rule 40(1)(d)(2), which applies to answering briefs (Rule 40(3)), provides as follows:

> "The phrasing of the questions presented need not be identical with that set forth in the jurisdictional statement or the petition for certiorari, but the brief may not raise additional questions or change the substance of the questions already presented in those documents. Questions not presented according to this paragraph will be disregarded, save as the court, at its option, may notice a plain error not presented."

The petition for writ of certiorari presented six questions. In the order granting review, this Court reduced the number of questions to four. The Government, at page 2 of its brief, undertakes to restate and reduce the questions, which, the Government's brief states, "are • • • the questions on which this Court granted certiorari" (Gov. Br. p. 2).

In addition, and making no effort to show that the exception stated in the last sentence of Rule 40(1)(d)(2) is applicable, the brief continues (Gov. Br. p. 2):

> "Another question—not raised by petitioner—is also presented. It is:
>
> Whether petitioner has waived the claim that its retained copies of the census reports are privileged."

Even if the rules of this Court do not limit the questions now presented to those raised in the petition for writ of certiorari, it appears to be settled that, in the absence of unusual circumstances compelling a contrary result, this Court will give consideration only to issues raised below.

> *United States* v. *Carignan*, 342 U. S. 36, 38 (1951);
>
> *United States* v. *Curtiss Wright Corp.*, 299 U. S. 304, 330 (1936);
>
> *Zellerbach* v. *Helvering*, 293 U. S. 172, 182 (1934);
> *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225 (1927).

In *Zellerbach Co.* v. *Helvering*, Justice Cardozo said for a unanimous court, at page 182:

> "One other contention of the Government is stated merely to exclude it from the scope of our decision. The Government makes the point that the petitioner's return, even if filed at the proper time, must be held to be a nullity for the reason that it commingles the income of the affiliated companies, parent and subsidiary, with that of another company, the A. S. Hopkins Company, previously dissolved. No such point was considered by the court below, nor was it suggested either in the petition for certiorari or in any response thereto. Review by this Court will be limited accordingly. *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *Charles Warner Co.* v. *Independent Pier Co.*, 278 U. S. 85, 91."

The underlying reasons for this rule were stated by this Court in *Hormel* v. *Helvering*, 312 U. S. 552 (1940), as follows (at p. 556):

> "This is essential in order that parties may have opportunity to offer all the evidence they believe

> relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision thereof issues upon which they have had no opportunity to introduce evidence."

To permit new issues to be raised in a brief served a few days prior to argument and after the record has been printed and filed is not only prejudicial to petitioner by denying it the right to offer evidence relevant to the new issue, but also forecloses it from relying on facts which were in the record in the District Court, but not included in the appendix record in the Court of Appeals or the portions of the record designated in this Court.

The unfairness which would result from permitting the raising of new issues after certiorari has been granted is well demonstrated by the case at bar. The new issue is the waiver of the privilege which attaches to the petitioner's file copies of census reports. The Government claims that having voluntarily permitted inspection by Commission representatives of some reports (R. 72) and furnishing copies of other reports pursuant to a subpoena duces tecum (R. 82, 83), petitioner has opened the door to copies of all such reports "relating to the specific subject", which the Government defines as "the series of [petitioner's] corporate acquisitions which were under investigation by the Commission" (Gov. Br. p. 23).

If this issue had been raised at the trial, petitioner could have shown all of the facts with respect to the Commission's inspection of petitioner's files and the circumstances of the voluntary compliance with the subpoena duces tecum. Moreover, evidence could have been offered as to the "specific subjects" covered by the census reports which were voluntarily furnished to the Commission and the

subject matter covered by the reports which were later demanded and which petitioner refused to produce. The present record only discloses the form number of the report and the name of the mill (item 10, R. 72-73) or the corporation reporting (Exhibits 72-87, R. 82-83).

Also relevant to the question of waiver is petitioner's claim of privilege made prior to the institution of any enforcement proceedings. The Government erroneously asserts in its brief (p. 17):

> "The first time that petitioner challenged the Commission's demand for production of the retained copies on the ground that they were 'confidential and privileged' was in its answer to the complaint in the district court (R. 72), filed on October 23, 1959 (R. 58). • • •"

Evidence in the record below (which the Government overlooked) shows the Government's error. Exhibit 108 annexed to the District Court's Exhibit 1A is a letter dated August 18, 1959, from petitioner's counsel to Hon. Robert M. Parrish, the Secretary of the Commission, in which petitioner's counsel said, among other things, the following:

> "A number of the items of information requested by the Commission are of confidential nature and, in our view, the Commission cannot properly require that such information be furnished. We refer particularly to request for copies of reports for the Census of Manufactures, which have been held confidential (see *U. S.* v. *Bethlehem Steel Corporation*, 21 F. R. D. 568, SDNY 1958; *Federal Trade Commission* v. *Orton, Secretary, The Borden Company*, F. Supp. SDNY 1959; 1959 Trade Cases, Par. 69, 404).

The privilege was again asserted by petitioner in its answer in the District Court (par. 15; R. 62). The Govern-

ment made no claim at the trial or on the appeal below that petitioner had waived its privilege.

It is only in exceptional circumstances involving an obvious error that an appellate court will permit an issue to be presented which was not before the Court below. (See *Blair* v. *Oesterlein*, *supra*, at p. 225.*) Here no such circumstances have been shown. On the contrary, all the circumstances show that the general rule limiting issues on appeal and that stated in Rule 40(1) (d)(2) of this Court should apply here.

In raising the additional question of waiver on this review the Government is attempting to provide this Court a means of avoiding a decision on the difficult census question on which the Commission and Antitrust Division of the Department of Justice take a position in conflict with that of the Department of Commerce, the Bureau of the Budget and the Solicitor General. However, avoidance of this issue is neither legally well grounded nor calculated to serve the ends of justice.

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* In the opinion of Justice Stone for a unanimous Court it was said:

> "We think the question suggested is not properly before us. It was not specifically raised on the record before the Board or either court below and, so far as appears, was not considered by any of them. We were asked to grant certiorari only to pass upon the question whether the Commissioner's determinations under §§ 327 and 328 may be appealed to the Board of Tax Appeals. This Court sits as a court of review. It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U. S. 195. There are specially cogent reasons why this rule should be adhered to when the question involves a practice of one of the great departments of the government. * * *"

II

In any event, petitioner has not waived its privilege that its retained file copies of the reports to the census of manufactures are not subject to the investigative process of the Commission.

Even if this Court should decide that the issue of waiver is before it, the facts and the law do not support such a claim of waiver. The Government asserts that, in 1957, when petitioner and three former subsidiary corporations voluntarily furnished to the Commission file copies of reports to the Bureau of Census, petitioner waived its privilege to withhold *any* census reports, on whatever subject, which the Commission might call for during the course of its investigation of petitioner.

The furnishing of these copies of census reports would have resulted in a waiver only if they were furnished without objection in the course of an adversary proceeding or under other circumstances which either (a) evidenced petitioner's intention to abandon a known right or (b) showed that petitioner sought to obtain some advantage out of the furnishing of the documents.

> *United States* v. *Goodman*, 289 F. 2d 256 (4th Cir., 1961);
>
> *Marcello* v. *United States*, 196 F. 2d 437, 445 (5th Cir. 1952);
>
> *United States* v. *Insurance Board of Cleveland*, 1954 Trade Cases, Para. 67, 873 (ND Ohio 1954; not otherwise reported).

In *Goodman* the Court said (at p. 259):

> "The Government suggests that Goodman's disclosures to the federal agents in 1950 constituted a

> waiver of his Fifth Amendment privilege asserted in the Tax Court hearing. This argument is entirely without merit and has been repeatedly rejected by the courts. It has been uniformly held that a prior disclosure to investigating officials cannot constitute a waiver of the privilege with respect to the same matter in a subsequent legal proceeding • • •".

In the case at bar, the copies of reports were furnished the Commission on a voluntary basis in an effort to cooperate with the Commission in its investigation in accordance with the Commission's rules, then in effect, which solicited such cooperation (Rules of Practice, Procedures and Organization, Sec. 1.31).

Contrary to the Government's assertion (Gov. Br. p. 9) the furnishing of the copies of the census reports to employees of the Commission does not make the reports "public". The last paragraph of Section 10 of the Federal Trade Commission Act* makes it a misdemeanor for any "officer or employee of the commission" to make public any such information unless directed by a court or the Commission. In addition the investigation being conducted by the Commission was a non-public proceeding as provided in its Rules of Practice then in effect (Sec. 1.42).

If the question of waiver had been raised in the District Court, evidence could have been offered to establish the lack of compulsion attending the production of the census reports in 1957. Fortunately, there was included in the record in the District Court (for another reason) a transcript of the so-called "subpoena" hearing the fall of 1957 (R. 74) in which the following statements were made:

> "Mr. Lamb [counsel for petitioner] • • • the investigation should be continued on a voluntary

* 38 Stat. 723 (1914); 15 U. S. C. §50 (1958). The Federal Trade Commission Act is hereinafter referred to as the "FTC Act".

> cooperative basis and without reference to a subpoena duces tecum. Our attending here today, while it coincides with the return date as fixed by the Commission for the subpeona duces tecum, is to explain our position as aforesaid and to make clear that we reserve all rights to oppose any proceedings by the Commission to enforce obedience to the subpoena duces tecum • • • ".
>
> "Mr. Seidman [Federal Trade Commission Attorney] • • • such objections as you may have have been reserved by you and should it be necessary it may be argued before the court in any proceeding brought by the Commission to enforce the subpoena or by you in behalf of St. Regis Paper Company to modify."

It was on that basis that most of the copies of census reports were furnished (R. 74), the balance having been available for inspection of documents conducted by a Commission investigator earlier in 1957 (R. 72). No waiver of privilege results from such voluntary cooperation with a government agency. But if, *arguendo*, a waiver was effected, all that was waived was the privilege with respect to the census reports actually inspected or furnished and such others as related to the same "specific subject" (*In re Associated Gas & Electric Company*, 59 F. Supp. 743 SDNY 1944).

A fatal defect in the Government's argument is its assertion that the extent of the waiver is determined by the scope of the proceeding in which the document is produced, rather than by the content of the document. Thus, instead of focusing on the documents, which petitioner and its former subsidiaries voluntarily submitted to the Commission, to determine the extent of the waiver, the Government claims that the scope of the Commission's investigation determines the area for which the privilege

has been waived. The Government argues (Gov. Br. p. 23):

> "The 'specific subject' with respect to which petitioner waived its privilege was the series of corporate acquisitions which were under investigation by the Commission."

As we have pointed out above, it is difficult, in the state of the present record, to describe with certainty the subjects covered by the census reports which were actually furnished to the Commission. But certain facts can be stated about them.

The subject matter of the census reports which had been produced was not "the series of corporate acquisitions which were under investigation by the Commission", as the Government claims (Gov. Br. p. 23). They were typical census reports containing economic data relating to the particular products manufactured by the plant or company reporting.

Although the precise nature of this economic data is not in the record in this Court, and was not introduced at the trial, because not in issue, the record does support the conclusion that the census reports which were furnished in 1957 and the census reports which the Commission's orders requested petitioner to produce concerned different subject matters.

The basic difference between the two groups is that the census reports demanded in the Commission's orders issued in 1959 are the reports of petitioner and thirteen of its former subsidiaries,* whereas the reports which were furnished in 1957 were the reports of only petitioner and four of its acquired companies (see Gov. Br. page 24). No reports have ever been submitted with respect to nine

* R. 24, 28, 32, 35, 40 and 48.

of the companies whose census reports were demanded in the Commission's orders. The reports of these nine companies which petitioner has withheld contain economic data with respect to products which are entirely different from the products manufactured by the four companies which had submitted some reports. For example, J. Neils Lumber Company, St. Paul and Tacoma Lumber Company and Northwest Door Company produced lumber and lumber products; Cupples-Hesse Corporation manufactured envelopes and tags; General Container Corporation, Ajax Box Co., Cambridge Corrugated Box Co. and F. J. Kress Company manufactured various types of boxes and containers. The companies which had furnished reports were mainly converters of various types of paper.

Thus the record on the subject establishes that the census reports demanded in the Commission's orders under review here called for copies of census reports of petitioner's divisions producing a diversity of products, none of which census reports had been furnished to the Commission in 1957.

Furthermore, the census reports furnished and the census reports requested in the Commission's orders, were for the most part, different kinds of reports.

The Census of Manufactures is conducted every four years. The reports which were furnished in 1957 were copies of reports to the Bureau of the Census for the 1954 Census of Manufactures. The reports demanded in the Commission's orders include, besides reports to the Bureau of the Census for the 1958 Census of Manufactures* (R. 51), copies of reports for the Annual Survey of Manu-

* See *Derrick* v. *St. Paul City Railway Company*, 89 N. W. 2d 629 (S. Ct. Minn. 1958).

factures for the years 1955, 1956 and 1957 (R. 28) and reports to the Bureau of the Census in connection with the "Facts for Industry Program" (R. 10).

To say that the voluntary furnishing of the reports relating to the commerce of four former subsidiaries opens the door to different kinds of reports of nine other former subsidiaries producing different lines of products during different periods, merely because they were furnished in the course of the same Commission investigation, is a long way from the holding of *In Re Associated Gas and Electric Co.*, 59 F. Supp. 743 (SDNY 1944) upon which the Government relies (see Government Brief pages 9, 18, 19, 23 and 24).

In the *Associated Gas and Electric* case the question was whether the production under a subpoena *duces tecum* of two of six letters relating to a certain corporation's participation in and knowledge of a particular proposed bond issue opened the door to the remaining four. The case holds no more than that the production, without objection, of a communication on a particular factual matter constitutes an intentional waiver of the right to claim a privilege with respect to the particular subject matter communicated. The rule was stated as follows (at p. 744):

> "• • • The petitioners having waived as to some of the letters relating to a specific subject opened the door to all the privileged correspondence between it and its attorney on that specific subject."

In *Magida* v. *Continental Can Co.*, 12 F. R. D. 74 (SD NY 1951), District Judge Kaufman of the same judicial district relied on the *Associated Gas* case and held that plaintiff, having answered questions with respect to a particular conversation with his lawyer during the course of a

pre-trial examination, had not waived his privilege as to the entire conversation. He said (at page 77):

> "• • • Defendant asserts that plaintiff effectively waived his privilege as to all conversations with his attorney because he volunteered certain portions of those conversations. I disagree. I see no intent to reveal the whole breadth of discussions in plaintiff's admitting, as he did, in a general way, that certain conversations took place. I do believe that plaintiff waived his privilege as to those immediate exchanges with counsel and I have so indicated by allowing those questions which concern themselves with those conversations. (#1 and #20 of plaintiff's examination.) Beyond that I will not breach the privilege."

Similarly in *In re Prudence-Bonds Corporation*, 76 F. Supp. 643, 647 (EDNY 1948) the production of one opinion letter by a corporate trustee involving a particular transaction did not open the door to the "several hundred" other opinions which its counsel had rendered to it. See also *Hashagen* v. *United States*, 283 F. 2d 345 (9th Cir. 1960).

Although we do not believe this Court should reach the question, we submit that if it does, upon all of the facts and the applicable rules this Court must hold that petitioner did not waive its privilege to withhold from the Federal Trade Commission its confidential retained copies of census reports.

III

The Government's arguments to sustain the imposition of forfeitures are without merit.

The Government's excursion outside of the issues properly before this Court should not divert attention from the main issue presented, whether petitioner, recipient of a substantially invalid agency investigative order, may

be held liable for penalties for non-compliance because it awaits a Government action in the nature of mandamus, in order to obtain a judicial declaration that portions of the order are defective.

In the case at bar, petitioner's administrative remedies had been exhausted. Failing in its efforts to have the Commission revise its demands (R. 166, 168-170, 193, 197), petitioner was presented with the option of complying with the defective orders or having the matter decided by a district court, either by commencing an action for a declaratory judgment or by awaiting mandamus proceedings to enforce the orders. It chose the latter.*

The Government suggests here, as it did in the Court of Appeals below, that the petitioner's only defense to the action was that the Commission lacked statutory authority to make the orders (Gov. Br. 52-53). This is not true. Petitioner asserted two kinds of objections, specific and general. Petitioner attacked specific questions contained in the orders on the grounds of privilege, vagueness and duplication. Most of the trial in the District Court was devoted to the consideration of these objections (See "Plaintiff's Specifications of Default and Defendants' Comments on Specifications of Default", lodged with this Court, see Gov. Br. p. 80). Petitioner was sustained on practically all of these objections except the objection regarding copies of census reports, which is one of the questions before this Court (R. 237).

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* That petitioner failed to initiate review proceedings and obtain a stay is of no consequence since the District Court found its objections to the Commission's questions well-founded (R. 210-212).

The Government attempts to justify the imposition of penalties on the ground that petitioner also refused to furnish answers on a general ground which the District Court did not sustain. However, since no revision of the questions was possible, petitioner had to await judicial proceedings (initiated by petitioner or by the Government) in order to assert its specific objections which were upheld. The Government characterizes the case (Gov. Br. p. 53) as:

> "• • • one in which a litigant's failure to comply with an order results not from any honest mistake of judgment as to what is required, or from excusable error in a good faith attempt to comply, but from the decision to contest the authority of the tribunal."

Petitioner's refusal to comply with the Commission's original, defective orders was not a "mistake" or "error". It was done in a good faith effort to clarify a poorly drafted agency investigative order which effort succeeded in large measure. (See District Court's opinion R. 212.)

The Government takes issue as to the extent of the invalidity of the Commission's orders. However, whether one-third or two-thirds of the questions were defective, the fact is that the orders were so substantially invalid that the District Court could not grant the relief in the nature of mandamus, as provided in Section 9 of the Federal Trade Commission Act, which the Government had requested. Petitioner respectfully submits that penalties under the third unnumbered paragraph of Section 10 of the Federal Trade Commission Act are inappropriate where the Commission's order has been found to be so defective and improper that the District Court could not grant "mandamus" (Section 9), as demanded in count

one of the Government's complaint. Obviously, in the belief that the District Court's determination of count one would not be improved in the Court of Appeals, the Government did not appeal from that part of the judgment of the District Court which drastically modified the Commission's original requests (R. 217).

The Government apparently agrees that the precise extent of the invalidity is not important, but for a different reason. According to the Government, petitioner should be penalized irrespective of the extent of the invalidity of the Commission's orders, so long as any of the questions contained therein were upheld. The Government says (Gov. Br. p. 58):

> "Petitioner incurred the penalties when it failed to file the reports ordered by the Commission, and neither the extent nor the method of subsequent judicial enforcement of the orders affected its liability therefor".

The facts of the case under review force the Government to the extreme position quoted above.*

Finally, in an effort to answer Point II of petitioner's main brief, the Government, at page 68 of its brief, refers to the legislative history of Section 10 of the Federal Trade Commission Act and attempts to read the third unnumbered paragraph of Section 10 so that the words "special report" include "answers in writing to specific questions" with the result that a failure to furnish "answers in writing to specific questions" would be punish-

* If, despite our arguments, this Court sustains the imposition of penalties, we respectfully point out that no penalties should be assessed from the date of the entry of the judgment of the District Court (April 21, 1960, R. 213-216) for the reason that since such date there has been no "failure" to furnish reports within the meaning of the third (unnumbered) paragraph of Section 10 of the F.T.C. Act. Since the entry of the District Court's judgment, petitioner has either furnished the information required to be furnished or has been excused from furnishing information by a court stay. Petitioner will support this view in further detail upon the issuance of this Court's mandate, if necessary.

able in the same manner as the failure to file a "special report". That, we submit, is an incorrect reading of the clear language of the statute.

In Section 6(b) of the Federal Trade Commission Act* Congress distinguished between "special reports" and "answers in writing to specific questions" and conferred upon the Commission the power to require both. The omission to include "answers in writing to specific questions" in the third (unnumbered) paragraph of Section 10 clearly left the failure to furnish such answers to be punished only as provided in the first paragraph of Section 10 which specifies a maximum fine of $5,000 and imprisonment for not more than one year for refusal to "answer any lawful inquiry".

The legislative history shows only that the requirement for "answers in writing to specific questions" was added to the original provisions of the proposed Act empowering the Commission to require annual and special reports from corporations, but without adding any language to the third paragraph of Section 10 providing for forfeitures for failure or refusal to furnish an annual or special report, and thus does not show a Congressional intent to make the forfeiture provisions applicable to requests for answers in writing to specific questions. The language of the statute is clear. The third paragraph of Section 10 does not provide any forfeiture for failure to furnish "answers in writing to specific questions" required by Section 6(b).

It is well established that when statutory wording is clear, it is controlling, and resort to legislative history will not be permitted to show an entirely different meaning and intent (*Ex Parte Collett*, 337 U. S. 55, 61 (1949); *Packard Motor Car Co.* v. *Labor Board*, 330 U. S. 485,

* 38 Stat. 721 (1914), 15 U. S. C. Section 46(b) (1958).

492 (1947); *Adams Express Co.* v. *Kentucky*, 238 U. S. 190, 199 (1915)). The Government's request to have this Court add a new and additional forfeiture provision should be rejected as improper.

For the reasons stated, the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF ST. REGIS PAPER COMPANY FOR REHEARING

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PETITION OF ST. REGIS PAPER COMPANY FOR REHEARING

Petitioner respectfully petitions for rehearing of this review on the following grounds:

First

The majority opinion by Mr. Justice Clark has overlooked or failed to consider an important provision in the Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. §§1001-1011 (1952), particularly §6(c), 5 U.S.C. §1005(c). It was pursuant to that section that the District Court entered an order and judgment directing petitioner to "comply with and respond to" specific "questions" set out in the 9 separate orders issued by the Federal Trade Commission (R. 210 and 213-216).

The majority opinion expressly "agree(d)" with the trial court and the Court of Appeals that although the Commission's orders were not "subpoenas", they were "similar process or demand(s)" within the language of

Section 6(c), and held that the District Court was empowered thereunder to order partial compliance with the Commission's orders. However, the opinion completely overlooked the fact that because the Commission's "orders" were such "similar process or demand", the penalty provision of Section 6(c) is controlling.

The oversight on the part of this Court is shown in the portion of the majority opinion reading as follows (pp. 15-16):

> "We agree with the trial court and the Court of Appeals that §6(c) of the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. §1005(c), authorized the procedure the court followed, i.e., ordering partial compliance. That section directs the court to sustain 'any such subpoena or similar process or demand to the extent that it is found to be in accordance with law . . . [sic].' Nor do we see any substance to the further contention that in directing partial compliance the trial judge treated those items found enforceable as subpoenas and therefore subject solely to contempt action."

If the sentence which is only quoted in part had been completed, the majority of the Court would have found "substance" in petitioner's contention regarding the determinations of the trial judge and the consequences thereof, namely, that the only penalty is punishment for contempt of the order and judgment of the District Court.

Section 6(c) provides:

> "(c) Subpenas. Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law *and, in any pro-*

> *ceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.*" (Emphasis added.)

The Commission's orders being "similar process or demand" within the meaning of §6(c) for the purpose of the partial enforcement provision, it necessarily follows that both the partial enforcement as well as the penalty provisions of §6(c) must apply. The Court could not, we submit, select one part of a sentence in §6(c) which defines the legal grounds for enforcement and disregard the conjunctive statutory direction regarding the punishment.

Except for the District Court's holding that the Commission's orders were "similar process or demand" within the meaning of §6(c), the District Court would have been without power to require partial compliance. There can be no doubt that the action in the District Court was "a proceeding for enforcement"; that the Commission's orders were "contest(ed)" in the District Court and that they were partially enforced pursuant to §6(c).[1] The

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[1] The majority opinion states in a subsequent sentence of its opinion (p. 16) that the District Court's orders are "not in substitution of the Commission's orders but merely an enforcement of them, in accordance with §9 of the F.T.C.A. authorizing the court to compel obedience to lawful Commission orders." Section 9 of the F.T.C. Act confers upon the District Courts jurisdiction "to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act, or any order of the commission made in pursuance thereof." (38 Stat. 722, 15 U.S.C. §49). That relief was demanded in "Count One" of the complaint (R. 1-5), but such relief was denied by the District Court (R. 210). In the language quoted at page 2, *supra*, the majority "agree(d)" that the District Court did not grant mandamus or a mandatory injunction, but, on the contrary, exercised powers under §6(c) of the Administrative Procedure Act, *supra*. Presumably, this inconsistency led to the mistake in holding that under §10 of the F.T.C. Act penalties accrued.

The majority opinion (at p. 12) also states that under the F.T.C. Act (15 U.S.C. §§41-58) the only penalty against a corporation is the

order of enforcement requiring the "production of the • • • data within a reasonable time" was necessarily "under penalty of punishment for contempt in case of contumacious failure to comply."

The majority opinion in affirming the judgment of the Court of Appeals leaves in effect the holding (285 F. 2d 607, 616):

> "Although modification of an agency's order under §6(c) of the Administrative Procedure Act results in the most efficient treatment of a partially void order, it carries with it the imposition of penalties for prior non-compliance."

That, we respectfully submit, is the exact opposite of what Congress intended in enacting §6(c) of the Adminis-

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$100 per day forfeiture for failure to file a "report"; that an individual, on the other hand, is subject to a fine of $1,000 to $5,000 or imprisonment of not more than one year, or both, for failure "to answer any lawful inquiry or produce documents", and that unless the Commission's orders require "reports", petitioner, a corporation, would not be subject to any penalty. The majority opinion concludes: "We cannot attribute such an anomaly to Congress."

To avoid this anomaly the majority holds, erroneously, we respectfully submit, that by the disjunctive phrase "or answers in writing to specific questions" in §6(b) of the F.T.C. Act Congress was merely explicating what the Commission might require of a corporation in an annual or special report. The error arises from the failure to observe that §2(b) of the Administrative Procedure Act (5 U.S.C. §1001(b)) defines the word "person" to include "individuals, partnerships, corporations . . .". Thus, where, as here, the District Court invoked the provisions of §6(c) of the Administrative Procedure Act, giving due consideration to the definition of "person" as well as other provisions of that section, it follows that the orders of a District Court made under such section are subject to the penalty for contempt both in the case of a corporation and an individual.

It also is to be noted that where a requirement to produce documents is enforced pursuant to §9 of the F.T.C. Act (and not §6(c) of the Administrative Procedure Act), the fine and imprisonment provisions mentioned above are held to apply to corporations as well as to individuals, *Federal Trade Commission* v. *Millers' Nat. Federation*, 23 F. 2d 968, 971 (D. C. Cir., 1927).

trative Procedure Act, as appears from the statute and the legislative history. The House Report[2] stated:

> "• • • The Section [6(c)] expressly recognizes the right of parties subject to administrative subpoenas to contest their validity in the courts prior to subjection to any form of penalty for non-compliance."

The Senate Judiciary Committee in its Committee Print of June 1945[3] stated:

> "• • • Subsection (c) is designed to • • • recognize that a private party may contest the validity of an administrative subpoena issued against him prior to incurring penalties for disobedience, since otherwise parties may in effect be deprived of all opportunity to contest the search or seizure involved. The 'haphazard' and often unfair methods of issuance of administrative subpoenas were recognized in the Final Report of the Attorney General's Committee (pp. 124-125, 414-415)."

The foregoing legislative history was quoted in our briefs in the Court of Appeals and in this Court. The majority opinion has made no reference to such history. The briefs of the United States made no attempt to contradict or overcome that legislative history.

The majority opinion appears to be the first decision of this Court which interprets Section 6(c) of the Administrative Procedure Act. The opinion conflicts with a long standing rule of this Court, stated prior to the enactment of the Administrative Procedure Act, that the recipient of an administrative agency subpoena may contest in good

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[2] H. Rep. No. 1980, 79th Cong., 2d Sess. (1946) reproduced in Administrative Procedure Act, Legislative History, S. Doc. No. 248, 79th Cong. 2d Sess. (1946), at p. 265.

[3] Administrative Procedure Act, Legislative History, S. Doc. 248, 79th Cong. 2d Sess. (1946), p. 27.

faith the lawfulness of the subpoena without fear of penalty unless such recipient fails to obey the court order of enforcement.[4]

In the dissenting opinion in *Penfield Co.* v. *S.E.C.*, 330 U. S. 585, 603 (1947), Mr. Justice Frankfurter wrote:

> "Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information. Congress has never attempted, however, to confer upon an administrative agency itself the power to compel obedience to such a subpoena. It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance. Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforce-

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[4] In considering question No. 5 on this review, whether the imposition of forfeitures deprives petitioner of property without due process, the majority opinion stated, at pages 16 and 17:

> "We need not consider this point at length for it appears that petitioner did not try to obtain judicial review prior to the commencement of this action by the government, nor did petitioner seek a stay once the litigation had begun. This inaction was in part based upon petitioner's reliance on *Federal Trade Comm'n* v. *Claire Furnace Co.*, 274 U. S. 160 (1927). This reliance was misplaced."

The majority opinion has overlooked or disregarded that it was the General Counsel of the Commission who, in part at least, induced such reliance. Moreover, *Claire Furnace* has not previously been overruled by this Court. On August 31, 1959, petitioner's counsel wrote the Commission's General Counsel requesting whether the members of the Commission would be willing to submit to the jurisdiction of the Court [United States District Court for the Southern District of New York] in a suit instituted by our client [St. Regis] against the Commission for declaratory judgment and injunctive

ment. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in our constitutional scheme. *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447; 155 U. S. 3. Accordingly, an order directing obedience to a subpoena by the Securities and Exchange Commission, like a subpoena of any other federal agency, does not issue as a matter of course. An administrative subpoena may be contested on the ground that it exceeds the bounds set by the Fourth Amendment against unreasonable search and seizure; that the inquiry is outside the scope of the authority delegated to the agency; that the testimony sought to be elicited is irrelevant to the subject matter of the inquiry; that the person to whom it is directed cannot be held responsible for the production of the papers. See *Interstate Commerce Commission* v. *Brimson*, *supra*, at 479 and 489; *Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407; *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434; *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33; *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298; *Oklahoma Press Pub-*

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relief (R. 200). On September 4, 1959 the General Counsel replied (R. 200, Ex. 113 to Ct. Ex. 1), stating:

> "In the event such suit should be filed, you are advised that we would be compelled to note the probable lack of jurisdiction in the Court upon the authority of *Federal Trade Commission* v. *Claire Furnace Co.*, 274 U. S. 160 (1927). . . ."

The District Court also found (R. 204) that petitioner's prior applications to the Commission to modify the Commission's orders were "reasonable efforts before the Commission itself to obtain reasonable conditions . . ." (Citing *U. S.* v. *Morton Salt*, 338 U. S. 632 at p. 653.)

lishing Co. v. *Walling*, 327 U. S. 186. And see Lilienthal, *The Power to Compel Testimony*, 39 Harv. L. Rev. 694."

In *ICC* v. *Brimson*, *supra*, this Court, by Mr. Justice Harlan, said at page 489:

> "• • • in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the Circuit Court, is determined adversely to the defendants and they refuse to obey, not the order of the commission, but the final order of the court."

The majority opinion of this Court has overturned a fundamental policy of the law applicable to government administrative agencies which found legislative approval in §6(c) of the Administrative Procedure Act. There Congress extended the policy, previously applicable to an agency "subpena", to include an agency's "similar process or demand". The majority opinion, having held that the Commission's questions are enforceable under §6(c), should logically have concluded that the only penalty to which petitioner is subject is the "penalty for contempt in case of contumacious failure [of petitioner] to comply" with the District Court's order and judgment.

Second

The majority opinion overlooks the fact that under the Census Act[5] Congress granted powers to a government department to "determine" forms of reports. Since the enactment of the statute the Census Bureau of the Commerce Department has consistently construed such power

[5] 68 Stat. 1013 (1954), 13 U.S.C. §5 (1958).

to include a requirement that the reporting corporation keep a retained copy of such report in the files of the reporting corporation and which would not be subject to any use by the government for "investigative" purposes. Such long continued practice and construction of the statute by the government department in charge thereof and in the performance of its functions under the statute should be accorded great weight in any judicial interpretation of the department's powers, *Alaska Steamship Co. v. U. S.*, 290 U. S. 256, 262 (1933).

For the reasons stated, rehearing should be granted as requested herein.

The undersigned hereby certifies, pursuant to Rule 58 of the Supreme Court Rules, that the foregoing petition for rehearing is presented in good faith and not for delay.

Respectfully submitted,

(signed) HORACE R. LAMB

.....

Attorney for Petitioner.

December 29, 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MOTION OF PETITIONER TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

HORACE R. LAMB,
Attorney for Petitioner,
One Chase Manhattan Plaza,
New York, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

MOTION OF PETITIONER TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

Petitioner St. Regis Paper Company respectfully moves the Court for an order of this Court recalling, and on such recall, amending or correcting the judgment of this Court herein, dated December 11, 1961 (although actually received in the office of the Clerk of the United States District Court for the Southern District of New York on January 19, 1962), so that, as so amended or corrected, the said judgment of this Court shall direct that in the determination of the number of days for which petitioner shall forfeit to respondent the sum of $100 (pursuant to the provisions of the third unnumbered paragraph of Section 10 of the Federal Trade Commission Act, 38 Stat. 723 (1914), 15 U.S.C. §59 (1958)) for each day of "failure"

to furnish reports to the Federal Trade Commission, as directed by the District Court, the District Court shall exclude the number of days during which the requirement to furnish reports to the Federal Trade Commission was suspended by the several stays granted by the District Court and the Court of Appeals, as follows:

1. The order of the District Court dated June 20, 1960 (not printed in the Transcript of the Record in this Court), which suspended and enjoined enforcement of the Court's judgment for a period of 20 days. Annexed hereto, marked Exhibit A, is a true and correct copy of said order.

2. The order of the Court of Appeals entered July 8, 1960 (not printed in the Transcript of the Record in this Court), which stayed and suspended the enforcement of the provisions of the District Court's order and judgment requiring the furnishing of the documents not previously furnished pursuant to such order and judgment pending a determination of the government's appeal and petitioner's cross-appeal in the Court of Appeals. Annexed hereto, marked Exhibit B, is a true and correct copy of said order.

3. The order of the Court of Appeals dated January 10, 1961, staying the mandate of that Court for a period of 30 days pending application to this Court for a writ of certiorari and thereafter pursuant to the provisions of Rule 28(c)(2) of the Court of Appeals Rules* (R. 235).

By motion dated February 7, 1961, filed with the petition for certiorari, petitioner also moved for a stay in

* Rule 28(c)(2) provides:

"(2) Provided that if within 30 days there is filed with the clerk of this court the certificate of the clerk of the Supreme Court of the United States that the certiorari petition, record, and briefs have been filed, thereupon the stay shall continue until the final disposition of the case by the Supreme Court. Immediately upon the filing of a copy of an order denying the writ, the clerk of this Court shall issue the mandate."

this Court pending final determination of the petition for certiorari, which was granted in the order of this Court allowing certiorari (R. 236-237).

The stays granted by the District Court and by the Court of Appeals pending the determination of the appeal in that court were not a part of the Transcript of the Record in this Court and were not noted in the opinion of this Court. Obviously without knowledge of the stays granted below, the Court said (Slip Opinion at page 16):

> "• • • nor did petitioner seek a stay once the litigation had begun."

Immediately after the filing by respondent of a notice of appeal, appealing from the dismissal of Count Two of the complaint (the claim for forfeitures) petitioner sought and was granted a stay of the requirement to furnish reports (Exhibit A hereto). We respectfully submit that the stay granted by the District Court and the subsequent stays of the Court of Appeals have the same legal effect as the stay granted by this Court which expressly tolled the accumulation of forfeitures under §10 of the Federal Trade Commission Act "as of the filing of its petition on February 7, 1961" (R. 237).

The third unnumbered paragraph of Section 10 of the Federal Trade Commission Act reads as follows:

> "If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day *of the continuance of such failure*, • • •" (italics supplied.)

The District Court's order and judgment (R. 213-216) required that most of the documents and records to be

furnished by petitioner be delivered within 30 days after entry of the judgment and also required delivery of the balance, consisting of reports to trade associations and retained copies of reports to the Bureau of the Census, within 60 days. All the documents and records required to be furnished the Commission within 30 days were furnished the Commission on May 20, 1960, prior to the expiration of the 30-day period.

The stays hereinabove listed relieved petitioner from the requirement to furnish the two remaining categories of documents continuously from and after June 20, 1960, the date on which the categories of documents were to be furnished in the 60-day period.*

There was no "failure" of petitioner, within the meaning of the language of the third unnumbered paragraph of Section 10 of the Federal Trade Commission Act, to furnish any reports during the periods of the several stays.

Accordingly, the period for which petitioner is liable for forfeitures of $100 per day commenced July 20, 1959, the 30th day following the first notice of default to petitioner, and terminated June 20, 1960, the date of the stay order of the District Court, Exhibit A hereto.

Thus the total number of days for which forfeiture may be directed to be paid by the final judgment of the District Court does not exceed 336, making the maximum total forfeitures $33,600.

At the date hereof, petitioner's attorney has not received notice of settlement of any proposed order to be entered in the District Court pursuant to the final judgment of this Court. In anticipation of a final judgment of the District Court, on January 23, 1962, petitioner delivered to the United States Attorney for the Southern District of New York copies of reports to the Census Bureau, the

* The portion of the stay relating to copies of reports to trade associations was vacated by the Court of Appeals by order entered April 26, 1961, and such copies were thereafter duly furnished.

only documents not theretofore furnished pursuant to the original order of the District Court entered April 21, 1960 (R. 213-216).

For the reasons stated, petitioner respectfully prays that an order be made herein recalling and correcting or amending the judgment of this Court, as hereinabove specified.

Dated: New York, N. Y.,
January 23, 1962.

Respectfully submitted,

HORACE R. LAMB

Attorney for Petitioner

Exhibit A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

against

ST. REGIS PAPER COMPANY,

Defendant.

ORDER

A motion having been made by defendant for an Order enjoining and suspending any and all proceedings to enforce the judgment made and entered herein on April 21, 1960 pending the determination by the United States Circuit Court for the Second Circuit of defendant's cross-appeal from said judgment or for such other period as may be just and proper and said motion having duly come on to be heard on June 17, 1960, and the Court having heard the argument of counsel and due deliberation having been had thereon, it is

ORDERED that the motion is granted to the extent that the enforcement of said judgment is suspended and enjoined for a period of 20 days from the date hereof in order to permit defendant, if so advised, to apply to the United States Circuit Court for the Second Circuit for an order suspending the enforcement of the said judgment pending the hearing and determination of said defendant's cross-appeal.

Dated: June 20, 1960

/s/ SYLVESTER J. RYAN
United States District Judge

Exhibit B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court House in the City of New York on the eighth day of July, one thousand nine hundred and sixty.

Present—Hon. HENRY J. FRIENDLY, Circuit Judge.

UNITED STATES OF AMERICA,
Plaintiff-appellant-appellee,

v.

ST. REGIS PAPER COMPANY,
Defendant-appellee-appellant.

A motion having been made herein by counsel for the defendant-appellant for a stay pending appeal,

Upon consideration thereof, it is

ORDERED, that the motion for a stay pending appeal be and it hereby is granted on the conditions that the defendant-appellant file and serve its brief and appendix on or before August 26, 1960.

FURTHER ORDERED, that the argument of the appeals be and it hereby is set for the week of September 26, 1960.

/s/ A. DANIEL FUSARO
Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

This motion seeks to shorten the period for which petitioner is subject to civil penalties for its failure to comply with orders of the Federal Trade Commission directing it to submit certain special reports. In its decision of December 11, 1961, this Court held that the statutory penalty of $100 a day "began to run 30 days after the notice of default on the first set of the Commission's orders [which notice was served on June 20, 1959, slip op., p. 5, R. 87] * * * and * * * runs until the date of our stay, February 7, 1961" (slip op., p. 14). Petitioner, relying on certain stay orders of the district court and the court of appeals, seeks to amend or correct the judgment of this Court to limit penalties to the period between July 20, 1959, and June 20, 1960, the date of the first of those orders (Motion, p. 4).

This motion should be denied because (1) it is a consecutive and untimely petition for rehearing which is prohibited by Rule 58(4) of the Revised Rules; and (2) it has no merit.

1. Although the motion in form is one to recall and amend or correct the judgment, in fact it is a petition for rehearing. It asks this Court to reverse its holding that the daily penalties ran until February 7, 1961, and instead to hold that the penalties ceased to accrue on June 20, 1960. Petitioner, however, has already filed a petition for rehearing of this Court's decision, which the Court denied on January 15, 1962. The present motion is an untimely attempt to seek rehearing on another issue that could have been, but was not, challenged in the first petition for rehearing.[1]

2. There is no substance to petitioner's argument that the lower court orders on which it relies stayed the imposition of penalties after June 20, 1960. Examination of those orders shows that this Court correctly held that petitioner is liable for penalties to February 7, 1961.

The Commission served its notice of default on the first set of orders on June 20, 1959, and under the statute the penalties began to accrue 30 days thereafter, on July 20, 1959. The government's suit in the district court sought two things: (1) a mandatory

[1] Although the petition for rehearing raised no issue as to the period during which penalties accrued, petitioner, in its reply brief on the merits, made substantially the same argument that it now makes. It there contended (footnote, p. 17) that no penalties should be assessed for any period after April 21, 1960, the date on which the district court entered its final judgment, because of the stay orders entered by the courts below.

injunction to compel compliance with the Commission's orders, and (2) the statutory penalty of $100 a day "for every day petitioner was in default of those orders directed specifically to it" (slip op., p. 2). The district court granted a mandatory injunction as to those portions of the Commission orders which it held were valid and as to which petitioner was still in default, but refused to award penalties (R. 204–212). Its judgment (R. 213–216), entered on April 21, 1960, directed petitioner to answer designated questions in the Commission's orders (some within 30, and the remainder within 60, days), and dismissed the count of the complaint seeking penalties.

The government appealed from the dismissal of its claim for penalties, and petitioner cross-appealed from the order insofar as it directed compliance. On June 20, 1960, the district court entered an order (Motion, p. 6) staying for 20 days the enforcement of its judgment of April 21, 1960, to enable petitioner to apply to the court of appeals "for an order suspending the enforcement of the said judgment pending the hearing and determination" of petitioner's appeal. On July 8, 1960, the court of appeals, on petitioner's motion, granted a "stay pending appeal" (Motion, p. 7). In an accompanying opinion (Appendix, *infra*, pp. 8–9), Judge Friendly stated that the district court had granted "a stay of enforcement of the 60-day provisions for 20 days," and that he was granting "a stay of the 60-day provisions of the judgment pending appeal." The "60-day provisions" of the judgment were those requiring petitioner to answer certain questions within 60 days. (Judge Friendly

noted that petitioner had already complied with the provisions directing the answering of other questions within 30 days.)

These two orders—upon which petitioner relies for its claim that penalties ceased to accrue after June 20, 1960—had nothing to do with the accrual of penalties. They did not stay the Commission's orders directing petitioner to submit the special reports. They merely stayed those portions of the district court's judgment that directed petitioner to answer certain questions within 60 days. Their purpose was to prevent the case from becoming moot during the appeal (which would have occurred had petitioner complied), and to protect petitioner from being held in contempt as the price for testing the orders on appeal, if its appeal failed.

The statutory penalty of $100 a day is imposed for failure "to file any * * * special report * * * within the time fixed by the commission for filing the same * * *" (15 U.S.C. 50), and not for violation of the court's enforcement order. The purpose of the penalty is to "furnish sufficient inducement to compliance with requests for information" (*United States* v. *Clyde S.S. Co.*, 36 F. 2d 691, 694 (C.A. 2) and, as the court of appeals pointed out, when one refuses to do what the law requires, he acts at his peril, in the sense that he must be held to the acceptance of any "lawful consequences attached to the refusal" (R. 230, quoting *Life & Cas. Ins. Co.* v. *McCray*, 291 U.S. 566, 574). Until the Commission's orders directing the filing of such reports were stayed, or until the running of penalties was expressly tolled,

the daily penalties continued to accrue. As shown below, the Commission's orders were never stayed, and the accrual of penalties was not stayed until this Court's order of March 27, 1961.

It was not until after the court of appeals held on December 16, 1960, that petitioner was subject to penalties (R. 218–233), that petitioner for the first time in the litigation sought, but was denied, a postponement of the effective date of the Commission's orders. On December 27, 1960, it sought both such a stay and a stay of the court of appeals' mandate pending the filing of a petition for certiorari.[2] The court granted only the latter request (R. 235–236). Chief Judge Lumbard, concurring in such action, stated (R. 235): "I would also provide that the accumulation of penalties under § 10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this court is stayed."[3]

In its petition for certiorari, filed on February 7, 1961, petitioner explicitly recognized that the court of appeals had refused to stay the Commission's orders. It stated (Pet. 8–9) that it had moved in the court of appeals for both a stay of the court's mandate and "for postponement of the effective date of the Commission's orders * * *"; that the court

[2] Copies of the various papers filed in the court of appeals in connection with the stay have been lodged with the Clerk.

[3] This Court held that the court of appeals had not abused its discretion in refusing to stay the effective date of the Commission's order. It noted that petitioner had not sought such a stay in the district court. Slip op., p. 17, note 13.

had "ordered its mandate stayed, as requested, but failed to grant petitioner's further application for postponement of the effective date of the Commission's orders"; and that, concurrently with the filing of the petition, it was also filing a separate motion "for an order postponing the effective date of the Commission's orders pending the conclusion of the review in this Court * * *."

This Court's order of March 27, 1961, granting the petition, further provided (R. 238) that petitioner's motion for a stay "is granted to the extent of tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under § 10 of the Federal Trade Commission Act * * *. Petitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation."[4]

This order marked the first time in this litigation that the accrual of penalties was stopped. Prior to the decision of the court of appeals awarding penal-

[4] Following the issuance of this Court's judgment to the district court after the denial of rehearing on January 15, 1962, the government moved in the district court for an award of penalties for the periods (1) July 20, 1959, to February 7, 1961, and (2) January 15, 1962, until petitioner had complied with the Commission's orders. On January 23, 1962, petitioner delivered a package of documents to the United States Attorney for the Southern District of New York, containing copies of various census reports. The other material called for by the Commission's orders was submitted after this Court, by its limited grant of certiorari (R. 237), refused to review the holding of the court of appeals that petitioner was required to submit such material.

ties, their accrual could have been terminated only by a stay of the Commission's orders directing the submission of the reports. The district court order of June 20, 1960, and the court of appeals order of July 8, 1960, however, did not stay the Commission's orders, but only the district court's compliance order of April 21, 1960. The staying of the latter order, however, did not stop the accrual of penalties. After the court of appeals' decision, that court was requested, but refused (over Judge Lumbard's dissent), to stay the accrual of penalties. This Court correctly held that petitioner is liable for penalties for the entire period from July 20, 1959, to February 7, 1961.

The motion should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1962.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT-APPELLEE

v.

ST. REGIS PAPER COMPANY, DEFENDANT-APPELLEE-APPELLANT

Motion of cross-appellant St. Regis Paper Company for a stay of portions of judgment

FRIENDLY, *Circuit Judge:*

In an action brought by the United States against St. Regis Paper Company under 15 U.S.C. §§ 49 and 50, Chief Judge Ryan, on April 21, 1960, directed St. Regis to comply with certain portions of various orders issued by the Federal Trade Commission, allegedly pursuant to 15 U.S.C. § 46(b), within 30 days and with other portions within 60 days; he dismissed the government's claim for penalties under 15 U.S.C. § 50. On the sixtieth day following the entry of judgment, the United States appealed to this Court from the judgment or dismissal; thereupon St. Regis cross-appealed from the judgment against it, Fed. R. Civ. Proc. 73(a). St. Regis, having already complied with the 30-day provisions of the judgment, obtained from Judge Ryan on the same day a stay of enforcement of the 60-day provisions for 20 days in order to permit it to apply to this Court for a further stay. This it now does.

The principal grounds of appeal urged by St. Regis are (1) that 15 U.S.C. § 46(b) does not cover the "special reports" here required even after the excisions made by Judge Ryan, and (2) that a large part of the 60-day items are copies of reports made to the Census Bureau. As to the first ground St. Regis has an uphill battle in view of *United States* v. *Morton Salt Co.*, 338 U.S. 632, 649 (1950); still I cannot say this ground of appeal is insubstantial without examining the particular items demanded. On the second issue, the Seventh Circuit has recently reached a conclusion opposed to Judge Ryan's, *Federal Trade Commission* v. *Dilger*, 276 F. 2d 739; this ground of appeal must clearly be regarded as substantial. Failure to grant a stay would deprive the appeal of much of its value and might even render it moot; on the other hand, the government presents no specific proof that significant injury will result from a stay. St. Regis' motion for a stay of the 60-day provisions of the judgment pending appeal is therefore granted, on condition that St. Regis serve its brief and appendix as cross-appellant by August 26, and that the appeals be brought on for argument during the week of September 26. The government is also directed to serve its brief as appellant by August 26.

The parties are requested to consider whether, under § 2 of the Act of February 11, 1903, c. 544, 32 Stat. 823, as amended by § 17 of the Act of June 25, 1948, c. 646, 62 Stat. 989, the appeals have been properly taken to this Court, and to discuss this in their briefs. See *United States* v. *New York, New Haven & Hartford R. Co.*, 276 F. 2d 525, 537–543 (2d Cir. 1960).*

*The order accompanying this opinion is printed at p. 7 of petitioner's motion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF ITS MOTION TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

HORACE R. LAMB,
Attorney for Petitioner,
One Chase Manhattan Plaza,
New York 5, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 47

ST. REGIS PAPER COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF ITS MOTION TO RECALL AND AMEND OR CORRECT THE JUDGMENT OF THIS COURT

The Government argues: (1) the $100 per day forfeitures are payable for non-compliance with the original Federal Trade Commission orders and not for non-compliance with the judicial order of enforcement, so that the stays of such judicial order which petitioner obtained did not affect the accumulation of forfeitures, and (2) petitioner failed to apply for a stay of the accrual of forfeitures until December 27, 1960 which was denied.

The complete answer to the Government's first argument is that petitioner was never required to comply with the Commission's orders as originally issued. Petitioner was required to answer only such of the Commission's questions as were specifically enumerated in the district court's order and judgment of April 21, 1960*.

* Transcript of Record, pp. 213-216.

The requirement to answer those Commission questions was suspended during the period of the stays granted by the district court on June 20, 1960, and by the court of appeals on July 8, 1960 and January 10, 1961. There is no merit in the distinction attempted to be made by the Government, namely, that the "accrual [of the forfeitures] could have been terminated only by a stay of the Commission's order directing the submission of the reports. The district court order of June 20, 1960 and the court of appeals order of July 8, 1960, however, did not stay the Commission's orders, but only the district court's order of April 21, 1960."*

To accept the proposition that forfeitures result from non-compliance with the original Commission orders, rather than from non-compliance with the valid parts of those orders which the district court enforced, would lead to the absurd result that forfeitures continue to accrue despite the delivery by petitioner to the Government of the documents required by the last category of questions (request for copies of census reports) which were furnished the Government on January 23, 1962.

The Government impliedly concedes (see footnote 4, p. 6) that the accumulation of forfeitures stopped when petitioner complied with the district court's order by the delivery of all documents required by such order. It must logically follow that the prior suspension of the same order by the stays described in petitioner's motion (at page 2) also stopped the running of forfeitures.

The distinction which the Government makes is inconsistent with this Court's holding that "* * * the court's order was not in substitution of the Commission's orders

* Government Brief, p. 7. Similarly at page 4 of the Brief it is urged that the stay orders "* * * did not stay the Commission's orders directing petitioner to submit the special reports. They merely stayed those portions of the district court's judgment that directed petitioner to answer certain questions within 60 days."

but merely an enforcement of them, in accordance with §9 of the F.T.C.A. authorizing the court to compel obedience to lawful Commission orders." (Slip opinion, p. 16.)

The Government's second argument, namely that petitioner failed to apply for a stay of the further accumulation of daily penalties until December 27, 1960, completely overlooks the fact that as early as June 20, 1960, petitioner had obtained a stay and suspension of the obligation to answer the remaining questions specified in the district court's order and judgment, i.e. those which had not been answered within 30 days after entry of the district court's order and judgment. The stays protected the petitioner from the further accumulation of the daily forfeitures for the period during which such obligation was suspended because during such period there was no "failure" to furnish reports within the meaning of the third unnumbered paragraph of Section 10 of the Federal Trade Commission Act,* the statute which provides for the forfeitures.

On December 27, 1960, at the same time that petitioner sought a stay of the court of appeals' mandate (thus continuing the suspension of the obligation to furnish the documents required to be furnished in the 60 day provision of the district court's order) it moved also for a postponement of the effective date of the Commission's orders until after the completion of review in this Court. But this additional application was not, as the Government suggests in its brief (page 5), an application for a stay of the further accrual of forfeitures. It was an application made pursuant to, and in the language of, Section 10(d) of the Administrative Procedure Act** which, if granted, would have completely postponed the effective date of the Commission's orders until after the completion of judicial

* 38 Stat. 722 (1914); 15 USC §46 (1958).
** 60 Stat. 243 (1946); 5 USC §1009(d) (1958).

review. Such relief, therefore, would have eliminated all forfeitures, not merely the further accumulation thereof which was accomplished by the stay of the court of appeals' mandate.

The application was made immediately following the court of appeals' reversal of the district court's judgment denying forfeitures. This was the first time any court had held petitioner liable for forfeitures. Such application was not untimely because Section 10(d) authorizes "• • • every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) • • •" to grant the relief requested.

Petitioner should not be prejudiced for having asserted its right to relief under such Section 10(d) at that time or because the court of appeals and this Court, when the motion was renewed here, failed to grant the relief in the form as requested.

The concurring statement by Judge Lumbard (R. 235) that he "would also provide that the accumulation of penalties under §10 of the Federal Trade Commission Act be stayed for such period and to the extent that the mandate of this Court is stayed", in our view, was unnecessary and apparently was so regarded by the majority of the court of appeals judges. The grant of the stay of mandate necessarily suspended the accumulation of forfeitures.

The petitioner's motion dated February 7, 1961, to this Court, which accompanied the petition for certiorari, was also made pursuant to Section 10(d) of the Administrative Procedure Act "for an order postponing the effective date of investigative orders issued by the Federal Trade Commission to petitioner and its former subsidiaries pending final determination in this Court of petitioner's petition for a writ of certiorari • • •". On consideration of

that motion, however, in the order granting certiorari, this Court added at the end thereof a reference to petitioner's motion, but granted such motion "to the extent of tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under §10 of the Federal Trade Commission Act, * * *".

We respectfully submit that the language limiting the grant of the motion "to the extent of tolling" as of the filing of the petition for certiorari was unnecessary in view of the stay granted by the court of appeals, which suspended the further running and accumulation of forfeitures, and which, under Rule 28(c)(2) of the Rules of that Court "continue[d] until the final disposition of the case by the Supreme Court * * *."

There was no failure on the part of petitioner at each stage of this litigation to request either (1) the remittance of the original Commission orders to the Commission for further consideration by the Commission and issue of new proper orders in accordance with the determination of the district court, or (2), when the district court determined that such procedure was impractical and "silly" (R. 210) and ordered compliance with the valid portions of the Commission's orders, a stay and suspension of the requirement to comply with such valid portions. Neither the fact that such stays were phrased in terms that suspended the district court's order (which specifically set out the valid Commission questions) nor that this Court and the court of appeals refused to grant the relief which was requested under Section 10(d) of the Administrative Procedure Act, should operate to prejudice petitioner, especially in a case of first impression, in the final decision of which three Justices of this Court have dissented. This Court should also give due consideration to the fact that petitioner was upheld by the district court

in petitioner's objections to more than a majority of the Commission's questions to petitioner and the Government did not appeal.

The final judgment of this Court should contain such directions to the district court for the entry of a judgment of that court for the amount to be paid by petitioner which will give effect to the stays granted in the courts below and in this Court. The present judgment of this Court dated December 11, 1961 (received by the district court January 19, 1962) fails to contain such direction.

For the reasons stated petitioner's motion should be granted and the judgment of this Court should be recalled and corrected or amended so that the judgment to be entered in the district court shall give full effect to all of the stays granted not only in this Court but also in the lower courts, all of which suspended the accumulation of forfeitures.

Respectfully submitted,

HORACE R. LAMB,
Attorney for Petitioner.

February, 1962